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10 **STATE OF CALIFORNIA**

11 **NEW MOTOR VEHICLE BOARD**

12 In the Matter of the Protest of:

13 SHAYCO, INC., dba
14 ONTARIO VOLKSWAGEN,

15 Protestant,

16 v.

17 VOLKSWAGEN OF AMERICA, INC.,

18 Respondent.
19 _____/

20 **Protest No: PR-2265-10**

21 **PROTESTANT'S PROPOSED FINDINGS**
22 **OF FACT**

I. INTRODUCTION

The record before the Board, and the evidence contained therein, demonstrate the many facts and circumstances establishing good cause to prohibit the proposed establishment of an additional Volkswagen dealership in Montclair, California. Protestant introduced substantial, if not overwhelming, evidence of the dire economic factors facing the four existing Volkswagen dealers *currently* assigned responsibility for portions of the Relevant Market Area (“RMA”). The evidence provides substantial and compelling evidence of the adverse impact the proposed establishment, if permitted, would have upon the existing dealers and the corresponding strong likelihood that one or more of these dealers would be forced to close its doors as a result. Upon reconsideration of the record before it, the Board find ample support for the following proposed findings:

- The Riverside-San Bernardino (“RSB”) Market and the RMA are already adequately served by the four existing dealers currently assigned responsibility for portions of the RMA.
- Volkswagen of America, Inc.’s (“VWoA”) opportunity analysis is inherently unreliable and cannot support a finding that available opportunity exists within the Ontario Primary Area of Influence (“PAI”) to permit Protestant, Shayco, Inc., dba Ontario Volkswagen (“Protestant” or “Ontario VW”) to re-capture the 19.4% of its new VW sales that would be lost to the proposed Montclair dealer.
- The evidence exposes the flaws of VWoA’s purported “opportunity” analysis in three key areas:
 1. First, VWoA’s use of a California average is an unreasonable standard to use to measure performance within the RSB Market and RMA given the unique characteristics of these areas.
 2. Second, this analysis is designed to show registration loss even in the highest performing markets in California and is therefore inherently unreliable.

1 3. The third major flaw in VWoA's "opportunity" analysis is the use of "in-sell" as
2 lost opportunity available to Protestant. This analysis is self-contradictory and based
3 upon the impossible assumption that any dealer can capture 100% of all sales within its
4 own PAI.

- 5 • Real-world evidence confirms the dire economic conditions facing VW dealers in the
6 RSB Market and explains why the VW brand performs below the California average
7 there. Thus the application of a California average to measure sales performance or
8 available opportunity in the RSB Market is not appropriate in consideration of the
9 existing circumstances.
- 10 • Protestant's current efforts to maximize its sales, service and parts business leave little
11 room for improvement. VWoA's suggestion that Protestant is missing out on large
12 volumes of available VW sales opportunities is not supported by the record.
- 13 • The establishment of the proposed Montclair dealer will adversely affect the retail
14 motor vehicle business and the public welfare in the relevant market area.
- 15 • VWoA's immediate plans to fill the Redlands and Victorville points will effectively
16 eliminate any opportunity Protestant might have to re-capture the 19.4% of its sales to
17 be lost to the proposed Montclair point, because the Montclair, Redlands and
18 Victorville PAIs account for approximately 40% of Protestant's total sales.
- 19 • VWoA's establishment of a new dealer in Moreno Valley and San Bernardino
20 subsequent to the initial have already addressed VWoA's claim that the RSB Market
21 has fewer dealers than the California average. In fact, the RSB Market is now *over-*
22 *dealt* by VWoA's own measure.
- 23 • Protestant has been recognized by VWoA as being in an "elite" category. The loss of
24 one of VWoA's best performing dealers would no doubt reduce the level of service
25 currently being provided to Volkswagen customers located within the RMA and
26 beyond.

- Protestant has made a substantial and permanent investment in its Volkswagen franchise that will likely be lost should the proposed establishment of an additional Volkswagen dealer in Montclair, California, be permitted.

II. PROCEDURAL HISTORY

1. By letter dated July 30, 2010, VWoA gave notice to Ontario VW of VWoA's intent to establish the proposed Montclair dealer.¹ On August 13, 2010, Ontario VW filed a timely Protest against the establishment of the proposed Montclair dealership.²

2. An eight-day hearing on the merits of the Protest was conducted before ALJ Archibald in Sacramento, California, from January 10, 2011, through January 14, 2011, and January 18, 2011, through January 20, 2011. Testimony from 13 live witnesses and more than 100 exhibits were admitted into the record. A considerable portion of the hearing was devoted to the testimony of Ontario VW's expert witness, Joseph Roesner, of the Fontana Group, and VWoA's expert witness, Sharif Farhat, of Urban Science. Each expert also prepared reports that were entered into evidence during the initial hearing, as well additional reports that were submitted on remand.

3. On May 26, 2011, the Board considered oral argument from counsel for both VWoA and Ontario VW regarding ALJ Archibald's First Proposed Decision. The Board's concern regarding the likely impact to the existing retail motor vehicle business was quickly placed at issue, as evidenced by Board Member Stevens' early question to Ontario VW's counsel: "I did not see it in the Decision, but was there testimony about where you primarily are drawing most of the business?"³

4. Ultimately, the Board by a three-to-one vote decided to remand the matter to ALJ Archibald to either take additional evidence or briefing on the good-cause factor at § 3063(b) of the Vehicle Code.⁴

5. The Board's Corrected Order Remanding the Proposed Decision dated May 19,

¹ J Exh. 35.

² J Exh. 36.

³ RT 5/26/11, 14:25-15:2.

⁴ RT 5/26/11, 66:21-67:3.

2011, (“Remand Order”) provided ALJ Archibald the following instructions:

“(1) The ALJ shall consider the evidence in the record or reopen the record as may be necessary to make additional findings of fact concerning the effect on the retail motor vehicle business and the consuming public in the relevant market area only. (Veh. Code § 3063(b))

(2) The ALJ shall provide additional facts on the methodology used in concluding that Protestant made 19.4% of new Volkswagen sales from the Montclair PAI in 2009. (J Ex. 42, Tab 11, Page 5.)

(3) The ALJ shall make a determination that (assuming hypothetically) there is a 19.4% reduction in Protestant’s sales due to the establishment of the proposed dealer in Montclair, where, in terms of geography, will Protestant re-capture those lost sales? The focus should not be limited to new retail sales but should also consider used vehicle sales, as well as warranty and any other customer pay services.

(4) The ALJ shall have discretion to order additional evidence, briefing, and/or arguments.”

6. Subsequent to the Board’s Remand Order, Ontario VW submitted additional evidence through declarations by Earl Reed, Gary Sherman, Greg Bozzani and Joseph Roesner. VWoA also submitted additional evidence, yet it failed to address one of the key issues on remand, namely, *where in terms of geography will Ontario VW recapture the 19.4% of its sales presumed to be lost to the Montclair dealer*, should it be established? Instead, VWoA simply reargued its original “available opportunity” analysis and was unable to provide any evidence regarding where these lost sales could be recaptured. After additional briefing, the matter was submitted to ALJ Archibald for further findings pursuant to the Board’s instruction.

7. ALJ Archibald’s Proposed Decision Following Remand again overruled the Protest.⁵ It was plain to see that the Proposed Decision Following Remand failed to

⁵ Prop. Dec. 9/15/11 at p. 42.

1 meaningfully answer ⁶ the seminal question of the Board's Remand Order -- *where in terms of*
2 *geography will Ontario VW recapture the 19.4% of its sales presumed to be lost to the*
3 *Montclair dealer*, should it be established? The Board considered the ALJ's Proposed Decision
4 Following Remand at the Board's September 27, 2011 meeting.

5 8. At the Board's September meeting, counsel for the parties were once again
6 provided an opportunity to present oral argument to the Board members.⁷ In addition to the
7 presentation of oral argument, counsel also provided the Board members a number of exhibits
8 from the record for consideration. Ultimately, the Board voted unanimously, with Mr. Brooks
9 abstaining, to reject the ALJ's Proposed Decision Following Remand and to draft its own
10 decision for consideration at the Board's December meeting.⁸

11 9. Having rejected the Proposed Decision following Remand, the Board, with
12 assistance of the Board's staff, drafted its own decision sustaining the Protest. A copy of the
13 Board's Decision was provided to the parties in advance of the Board's December 13, 2011,
14 meeting in Sacramento, California.⁹

15 10. After careful consideration of the parties' arguments, the Board voted three-to-
16 none to adopt the Final Decision.

17 11. On or about January 24, 2012, VWoA filed its Verified Petition for Writ of
18 Administrative Mandate, in the Superior Court of Sacramento County, requesting that the Court
19 issue a ruling directing the Board to vacate its decision and instead issue a decision overruling
20 the Protest.

21 12. The matter was briefed for the Court and oral arguments were presented on
22 December 7, 2012. The Court issued its Ruling on Submitted Matter: Petition for Writ of
23 Mandamus ("Ruling"), dated January 30, 2013, remanding the matter back to the Board with
24 instructions that:

25 "The writ shall direct the Board to vacate its final decision in this case, dated

26 ⁶ The ALJ's Proposed Decision on Remand failed to specify where in its own PAI or throughout the entire RSB
27 Market, the lost sales could reasonably be expected to be recaptured by Ontario VW. (Prop. Dec. 9/15/11 at p. 29.)

28 ⁷ RT 9/27/11.

⁸ RT 5/26/11, 95-96.

⁹ Order Conf. Decision, 11/30/11.

December 13, 2011, and shall remand the matter to the Board with directions to reconsider the matter in compliance with Government Code section 11517(c)(2)(E)(ii) by deciding it upon the record after affording the parties an opportunity to present oral or written argument.”¹⁰

13. In Response to the Court’s Ruling, the Board vacated its Decision at the February 22, 2013, Meeting and scheduled additional written and oral argument to be considered by the Board Members at the March 13, 2013, Meeting.

14. At the March 13, 2013, Board Meeting the Board determined that it would consider additional evidence to be submitted by the parties, despite Protestant’s opposition.¹¹ The Board further determined that the parties would have the opportunity to submit evidentiary objections to the submitted evidence.

15. On or about April 12, 2013, Protestant submitted additional evidence through the declarations of Earl Reed and Joe Roesner. Respondent submitted additional evidence through the Declarations of Shariff Farhat and Charles Kim.

16. On April 19, 2013, Protestant filed a number of evidentiary objections to the evidence submitted by Respondent. Respondent filed no objection to the evidence submitted by Protestant.

PARTIES AND COUNSEL

17. Protestant is an authorized Volkswagen dealership located at 701 S. Kettering Drive, Ontario, California.¹² It is owned by Gary Sherman and his wife through a family trust, referred to as Shayco, Inc.¹³ Protestant is a “franchisee” within the meaning of Sections 331.1 and 3062(a)(1) of the California Vehicle Code.

18. Protestant is represented by the Law Offices of Michael J. Flanagan, by Michael J. Flanagan, Esquire, and Gavin M. Hughes, Esquire, 2277 Fair Oaks Boulevard, Suite 450,

¹⁰ Ruling at Page 10.

¹¹ (RT 3/13/13)

¹² Jt. Stip. Fact 1; Jt. Exh. 36.

¹³ RT Jan. 10, pp. 211 – 212.

1 Sacramento, California.

2 19. Respondent is a “franchisor” within the meaning of Sections 331.2 and
3 3062(a)(1) of the California Vehicle Code.

4 20. Respondent is represented by Jeffer Mangels Butler & Mitchell LLP, by Allen
5 Resnick, Esquire, and Ryan S. Mauck, Esquire, 1900 Avenue of the Stars, Seventh Floor, Los
6 Angeles, California.

7 **Protestant’s Witnesses at the Merits Hearing**¹⁴

8 21. Protestant called the following witnesses: Gary Sherman, dealer principal,
9 Ontario VW; Earl Reed, General Manager, Ontario VW; Greg Bozzani, dealer principal and
10 managing partner of SAI Auto Group, LLC, the operator of Bozzani Volkswagen in Covina;
11 Howard Hawkins, Chief Financial Officer of the Metro Autogroup, Montclair.¹⁵ Protestant’s
12 expert witness was Joseph F. Roesner, Vice President, The Fontana Group.

13 22. Following remand from the Board, Protestant submitted declarations from Gary
14 Sherman, Earl Reed, Greg Bozzani, Frederick E. Hitchcock, Jr., and Joseph F. Roesner.

15 23. Following remand from the Sacramento Superior Court, Protestant submitted
16 additional declarations of Joseph F. Roesner and Earl Reed.

17 **Respondent’s Witnesses at the Merits Hearing**¹⁶

18 24. Respondent called the following witnesses: Tony Ray, General Manager of
19 Dealer Network Development, Western Region, VWoA; Steve Mears, a VWoA employee who
20 was previously Regional Director, Western Region, VWoA; Edward Starr, City Manager, City
21 of Montclair; Marilyn Staats, Director of Redevelopment and Public Works, City of Montclair;
22 Kurt Thomas, Regional Parts and Accessories Consultant, Western Region, VWoA; John
23 Hawkins, dealer principal, Metro Honda, Montclair; Steven Smith, Sales Operations Manager,
24 Area 52, VWoA. Respondent’s expert witness was Sharif G. Farhat, Vice President of Expert

25 ¹⁴ Unless otherwise indicated, all testimony and other evidence referred to is evidence received at the merits
26 hearing prior to the remand. There was no additional hearing after the remand so there would be no oral testimony
after remand. However, there were declarations and exhibits after the remand.

27 ¹⁵ Howard Hawkins was called pursuant to Evidence Code section 776, which permits a party to call as a witness a
person associated with an adverse party and to examine the witness as if under cross-examination, i.e., to use
leading questions in its direct examination.

28 ¹⁶ See footnote 12.

Analytical Services, Urban Science Applications, Inc.

25. Following remand from the Board, Respondent submitted declarations from Anthony Ray, Kurt Thomas, and Sharif G. Farhat.

26. Following remand from the Sacramento Superior Court, Respondent submitted declarations of Sharif Farhat and Charles Kim.

DEPOSITION TESTIMONY AT THE MERITS HEARING¹⁷

27. Pursuant to a stipulation by the parties, deposition excerpts of the following deponents were admitted: Debbie Scheline, Business Manager, Shayco, Inc.; Jack Feely, Jr., Business Improvement Manager, VWoA; Ron Stach, General Manager of Sales, Western Region, VWoA.

EVIDENTIARY ISSUES AT THE MERITS HEARING¹⁸

28. The parties offered over 100 exhibits at the January 2011 hearing, and all exhibits offered were admitted into evidence. Hearsay objections were raised to newspaper and journal articles; those objections were overruled by ALJ Archibald.

29. During the merits hearing, Respondent's motion for a protective order in regard to Joint Exhibit 55, an e-mail from Tony Ray to Howard Hawkins and the accompanying Letter of Intent, was granted. During the hearing, Respondent's motion to expand the protective order to include testimony by Steve Mears concerning Bozzani Volkswagen, was granted.

30. No request was made by Protestant to continue the hearing for the purpose of reopening discovery or submitting additional testimony.¹⁹

31. On remand from the Board, exhibits which constitute hearsay have been admitted and have been given the appropriate weight.

32. On remand from the Board, the documents received by the Board July 29, 2011 from Protestant characterized as "additional evidence Protestant reserves the right to use as an

¹⁷ See footnote 12.

¹⁸ See footnote 12.

¹⁹ Protestant states that on the last day of the hearing it became aware of "falsely reported sales" which may have corrupted the standard for measuring performance of the RMA, as well as other geographic areas of analysis. Protestant contends that it was denied the opportunity to explore this behavior. (Prot. Post-Hearing Reply Brief, p. 2: 21-28.)

1 exhibit to its brief” and numbered OVWR 0000001 through OVWR 0000252 were not
2 admitted.

3 33. On remand from the Board, the Declaration of Frederick E. Hitchcock, Jr.,
4 offered by Protestant was not admitted. The Board determined that the Declaration is contrary
5 to the Board’s Remand Order and contrary to the ALJ’s Order Regarding Pre-Hearing Matters
6 on Remand. The Declaration was an attempt to fill an evidentiary gap noted in the original
7 Proposed Decision.

8 34. The Supplemental Declaration of Joseph F. Roesner On Remand dated August
9 31, 2011, and presented by Protestant to correct an alleged misstatement in Respondent’s Reply
10 Brief was not admitted, nor was the correspondence of counsel for Protestant and Respondent
11 concerning this offer. The concept of “radius” as presented by Mr. Roesner and argued by
12 Respondent does not require correction.

13 35. On remand from the Board, the ALJ requested clarification of the Supplemental
14 Declaration of Anthony Ray on Remand due to a real estate advertisement in the August 29,
15 2011 issue of *Automotive News*. The Third Declaration of Anthony Ray on Remand was
16 submitted and considered solely for its response to the ALJ’s questions. Protestant’s request to
17 exclude the Third Declaration of Anthony Ray on Remand was denied. Protestant’s request to
18 submit additional evidence regarding the status of the Redlands and Victorville open points was
19 denied, and the arguments of Protestant’s counsel in correspondence were not considered.

20 **ISSUE PRESENTED**

21 36. The following issue is presented by this protest: Did Ontario VW, the only
22 Volkswagen dealership geographically located within the 10 mile radius of the proposed
23 establishment site, sustain its burden of proving good cause to preclude VWoA from
24 establishing the proposed dealership at the stated location in Montclair?

25 37. Under Section 3062(a)(1), when a timely protest has been filed, a franchisor is
26 not permitted to establish the proposed motor vehicle dealership until a hearing has been held
27 before the Board, nor thereafter if Protestant establishes at the hearing that there is good cause
28

not to permit the establishment.

38. In determining whether there is good cause for not entering into an additional franchise for the same line-make, Section 3063 requires the Board to take into consideration the existing circumstances, including, but not limited to, all of the following:

- (a) Permanency of the investment.
- (b) Effect on the retail motor vehicle business and the consuming public in the relevant market area.
- (c) Whether it is injurious to the public welfare for an additional franchise to be established.
- (d) Whether the franchisees of the same line-make in that relevant market area are providing adequate competition and convenient consumer care for the motor vehicles of the line-make in the market area which shall include the adequacy of motor vehicle sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel.
- (e) Whether the establishment of an additional franchise would increase competition and therefore be in the public interest.

39. This statutory scheme is evidence that the Legislature “intended that the Board balance the dealers’ interest in maintaining viable businesses, the manufacturers’ interest in promoting sales, and the public’s interest in adequate competition and convenient service.”²⁰

PROTESTANT’S CONTENTIONS

40. Protestant contends: the Inland Empire²¹ is over-dealered, cannot sustain an additional VWoA dealership, and the additional dealership would result in ruinous competition among the four dealers currently assigned responsibility for the RMA; VWoA’s “lost opportunity” analysis is flawed, and the accuracy of sales figures is impacted by falsely reported sales; the Inland Empire economy has suffered a more adverse impact than the remainder of California markets or the nation as a whole; the Metro Autogroup and Messrs.

²⁰ *Piano v. State of California ex rel. New Motor Vehicle Board* (1980) 103 Cal.App.3d 412, 417.

²¹ Witnesses used this term without defining the boundaries of its geographic area; as understood from the context of the testimony, “Inland Empire” refers to Riverside and San Bernardino counties.

1 John and Howard Hawkins are not the right choice to operate the new VWoA dealership;
2 Ontario VW has a substantial and permanent investment which will be negatively impacted by
3 the new dealership; the RMA is already adequately served by existing dealers currently
4 assigned responsibility for the RMA and the new dealership will not benefit consumers and will
5 instead harm the public; and VWoA's new strategic plan to increase sales is "pie in the sky," as
6 evidenced by the slowing of Volkswagen sales and its own downward revised sales projections.

7 **RESPONDENT'S CONTENTIONS**

8 41. Respondent contends: the new dealership will have a positive impact on the
9 retail motor vehicle business and the consuming public in the RMA; establishing a dealership
10 in Montclair will benefit the public welfare; Ontario VW is not providing adequate competition
11 and convenient customer care in the RMA; competition will increase with an additional
12 dealership; and Ontario VW's investments in its VWoA dealership are not jeopardized by a
13 new dealership in Montclair.

14 **PROPOSED FINDINGS OF FACT²²**

15 **PRELIMINARY FINDINGS**

16 **VWoA's Plans for Increasing Sales in the United States**

17 42. Sales of Volkswagen vehicles in the United States in 2010 were 260,000
18 vehicles, but VWoA expects to sell double that number within two years and increase sales to
19 800,000 by 2018.²³ The newly appointed head of this campaign to increase sales in the United
20 States is Mr. Jonathan Browning, President and CEO of VWoA. VWoA has built a plant in
21 Tennessee to produce a new Passat in 2011, designed and priced for the American market. The
22 new Passat is expected to compete in the midsize sedan range with vehicles like Toyota's
23
24

25 ²² References to testimony, exhibits or other parts of the record are examples of evidence relied upon to reach a
26 finding and are not intended to be all-inclusive. Transcripts of the proceedings are referred to by date. Deposition
testimony is referred to by the deponent's name. References to "Exh." are to Joint, Protestant's, or Respondent's
Exhibits. To distinguish them from exhibits from the hearing, exhibits on remand are so labeled.

27 Findings of Fact are organized under topical headings for readability only. They are not to be considered
relative to only the particular topic under which they appear, but rather, may apply to any of the good cause factors
of Section 3063.

28 ²³ RT Jan. 18, pp. 109 - 110; RT Jan. 19, p. 240; Stach Depo. pp. 34, 35, 38.

1 Camry.²⁴ VWoA also plans to introduce a new Jetta, the next generation new Beetle, and a
2 new Touareg.²⁵

3 43. Toyota, one of VWoA's primary competitive groups, sold 1.3 million new
4 vehicles nationally in 2010.²⁶ VWoA's primary competitive groups, in addition to Toyota,
5 include Honda, Nissan, Mazda, Hyundai, and Subaru.²⁷

6 44. A J.D. Powers evaluation of sales satisfaction by brand for 2010 ranked VWoA
7 26th in the nation and resulted in a motivational memo from Mr. Browning to VWoA's 582
8 dealers in the United States.²⁸

9 **VWoA in the Western Region, California, and Area 52**

10 45. VWoA has divided the United States into four geographic regions for
11 administrative purposes. California, which has approximately 130 VWoA dealers, is in the
12 Western Region.²⁹ The California dealers are grouped into smaller areas by their locations,
13 with each area given a number.³⁰

14 46. Ontario VW is one of 10 VWoA dealers in what VWoA has designated as Area
15 52. The proposed Montclair dealership would also be in Area 52. Of the 10 existing VWoA
16 dealerships in Area 52, three of them (Ontario VW, Riverside VW, and Cardinale Way VW in
17 Corona), are in the Inland Empire.³¹

18 47. The importance of highways and freeways in Area 52 cannot be
19 overemphasized. The I-10 Freeway runs east-west through Area 52 and the northern area of
20 Montclair and continues westward to the Pacific Ocean. VWoA is extraordinarily concerned
21
22

23 ²⁴ RT Jan. 18, pp. 20-23; 107-108; Resp. Exh. 65.

24 ²⁵ RT Jan. 20, p. 121.

25 ²⁶ RT Jan. 18, pp. 109 -110.

26 ²⁷ RT Jan. 19, pp. 10, 69; Jt. Exh. 44, App.11.

27 ²⁸ Prot. Exh. 106; RT Jan. 18, pp. 20, 108 - 109. Testimony and exhibits reflecting the current number of dealers
28 varies; however, 582 is the most specific.

²⁹ RT Jan. 13, p.110; RT Jan. 18, p. 13.

³⁰ RT Jan. 18, p. 13; RT Jan. 20, p. 116.

³¹ RT Jan. 18, p. 43; RT Jan. 20, pp. 116, 126. Protestant's allegation on remand that two additional dealerships
have been "appointed" in Riverside County is not supported by the evidence. (Second Declaration of Earl Reed on
Remand, para. 4;P Exh. R 24.)

1 that from Indio to Santa Monica, there is not one VWoA dealership “on” the I-10 Freeway or
2 even visible from that freeway.³²

3 48. Ontario VW is on the I-15 Freeway, which runs north to south.³³ The City of
4 Ontario is crossed by the I-15 and I-10 Freeways and Highways 60 and 210.³⁴

5 **The Montclair Open Point**

6 49. The City of Montclair is approximately 35 miles east of Los Angeles on the
7 western edge of San Bernardino County.³⁵ The city is primarily south of the I-10 Freeway.³⁶
8 Most new car dealerships are south of the I-10 Freeway, toward the north end of town.³⁷

9 50. When Urban Science Applications, Inc., a consulting firm employed by VWoA
10 determines that a geographical area needs additional VWoA representation, that location is
11 placed on the “Open Point list”.³⁸ Placing a location on the Open Point list does not guarantee
12 that VWoA will actually decide to establish a dealership at that location, and the list changes
13 yearly.³⁹

14 51. Montclair was placed on the Open Point list in 2006.⁴⁰ Although the National
15 Association of Minority Automobile Dealers was notified twice about the potential Montclair
16 Open Point, and although VWoA had interest from a number of parties, VWoA did not declare
17 the point open and begin to accept applications until 2010 because the issue of available real
18 estate hampered interest.⁴¹ However, Respondent chose to eliminate the Montclair Open Point
19 following the Board’s initial decision to sustain the Protest in December 2011, assigning the
20 former Montclair PAI census tracts to the existing dealers.

21 52. On August 26, 2009, Tony Ray and Steve Mears of VWoA met with Gary
22 Sherman and Earl Reed of Ontario VW to discuss potential open points in Montclair, San

23 ³² RT Jan. 18, pp. 82 - 83; RT Jan. 19, p. 14.

24 ³³ Jt. Exh. 42, Tab 4, p. 2, incorporated herein as Attachment 1 (“Volkswagen Dealer Locations, Census Tracts
Touching 10-Mile Ring Around Add Point”).

25 ³⁴ RT Jan. 19, p. 186.

26 ³⁵ RT Jan. 19, p. 131.

27 ³⁶ RT Jan. 19, p. 132.

28 ³⁷ RT Jan. 19, p. 136.

³⁸ RT Jan. 18, p. 16.

³⁹ RT Jan. 18, p. 17.

⁴⁰ RT Jan. 18, p. 29.

⁴¹ RT Jan. 18, p. 63; RT Jan. 19, pp. 110, 158.

1 Bernardino, and Redlands.⁴² At this meeting Messrs. Ray and Mears displayed graphics which
2 they described as “scenarios”, with San Bernardino and Redlands as separate, but “technically
3 not” open points.⁴³

4 53. At this August 26, 2009, meeting, Mr. Sherman told Messrs. Ray and Mears
5 there was no need for an additional dealership in Montclair, and that San Bernardino and
6 Redlands could not support two dealerships.⁴⁴ Mr. Reed confirmed that Mr. Sherman voiced
7 his concern that establishing a Montclair dealership would be a mistake.⁴⁵ However, VWoA
8 claims it did not become aware of Mr. Sherman’s concerns until it received an e-mail dated
9 May 24, 2010, after Mr. Sherman learned he had not been awarded the Montclair point.⁴⁶ The
10 testimony of Mr. Sherman and Mr. Reed is more credible.⁴⁷

11 54. The region recommends to VWoA’s corporate office when it is time to establish
12 a point, declare it open, and begin accepting applications.⁴⁸ On November 17, 2009, Mr. Mears
13 mentioned to Mr. Sherman that Montclair would quite possibly be declared an open point in
14 early 2010, and that the application period would be open soon.⁴⁹

15 55. Although Mr. Sherman testified that he believed an additional VWoA dealership
16 in Montclair was not necessary, Mr. Reed encouraged him to apply for the point as a defensive
17 measure.⁵⁰ Mr. Sherman agreed that it would be better to operate the Montclair dealership,
18 even if he took a loss for a period, rather than to have some other dealer be selected for the
19 point.

20 ⁴² RT Jan. 10, p. 141; RT Jan. 19, p. 9.

21 ⁴³ RT Jan. 11, p. 31; RT Jan. 18, p. 36; Prot. Exhs. 86, 87.

22 ⁴⁴ RT Jan. 11, pp. 32, 42; RT Jan. 19, p.68. After that meeting, and hoping he could convince VWoA that only one
23 point was needed between San Bernardino and Redlands, Mr. Sherman began negotiations to purchase a Hyundai
dealership in Loma Linda, which is on the I-10 Freeway. RT Jan. 11, p. 53; RT Jan. 20, pp. 174-175. The
negotiations for the Loma Linda site fell through, and Mr. Sherman learned later that VWoA had reviewed the
“scenarios” and decided that only one open point, in Redlands, was necessary. RT Jan. 11, pp. 32 – 35.

24 ⁴⁵ RT Jan. 10, pp. 139-140.

25 ⁴⁶ Prot. Exh. 83.

26 ⁴⁷ There would be no reason for Mr. Sherman to voice his opinion about San Bernardino and Redlands, but remain
27 silent about Montclair. Prior to May 24, 2010, the parties engaged in numerous e-mail communications. VWoA
argues that none of them contains an expression of Mr. Sherman’s concern over any negative impact of a Montclair
dealership. Jt. Exh. 19; Resp. Exhs. 8, 11. Mr. Sherman’s explanation is quite plausible: he didn’t want to “get in
their face” since he was applying for the Montclair point as a defensive measure. RT Jan. 11, pp. 228 – 229.

28 ⁴⁸ RT Jan. 19, pp. 70-71.

⁴⁹ RT Jan. 19, p. 72.

⁵⁰ RT Jan. 10, pp. 143-144; RT Jan. 11, p. 46.

1 56. Mr. Sherman had previously operated new motor vehicle dealerships in
2 Montclair. Shayco, Inc. still owns the property where the former dealerships were located.⁵¹
3 The property is on Central Avenue, probably the busiest traffic corridor in Montclair.⁵² The
4 property is about one mile from the I-10 Freeway; it is not visible from the Freeway.⁵³

5 57. The City of Montclair's general plan does not provide for bringing automobile
6 dealerships back into the Central Avenue area.⁵⁴ Nevertheless, because Mr. Sherman had a
7 good working relationship with the City of Montclair, it agreed to a proposal by which the City
8 of Montclair would give credit against sales tax in the amount of \$1,000,000 to permit Mr.
9 Sherman to upgrade his vacant dealership into a new VWoA dealership.⁵⁵

10 58. Mr. Sherman believed he could make the Montclair point work by cutting
11 overhead in the two dealerships - for example, by sharing staff. When asked by Mr. Ray during
12 a December 8, 2009, visit to the Central Avenue property, Mr. Sherman confirmed that he was
13 confident that he could sell 1,000 units per year from that location.⁵⁶ Mr. Sherman assured
14 Messrs. Ray and Mears that he could maintain superior sales and service, provide an above
15 average sales penetration in his area of responsibility, and provide good management.⁵⁷ Mr.
16 Sherman submitted an application to become the dealer at the Montclair Open Point.⁵⁸

17 59. After Mr. Ray and Mr. Mears conducted their site visits to Mr. Sherman's
18 Central Avenue location and compared it to the Metro Autogroup site, which is on the preferred
19 I-10 Freeway, Mr. Mears instructed Mr. Ray to offer Mr. Sherman additional time to obtain a
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21
22 ⁵¹ RT Jan. 11, p. 57.

23 ⁵² RT Jan. 19, p. 141.

24 ⁵³ RT Jan. 19, p. 145.

25 ⁵⁴ RT Jan. 19, p. 156.

26 ⁵⁵ Jt. Exh. 41. Mr. Sherman met with City representatives in mid-August 2010 after he filed his Protest in this
27 matter. He failed to advise them that he had not been selected as the dealer for the Montclair Open Point, and they
28 believed a decision had not yet been made. (RT Jan. 11, pp. 211 - 213; Resp. Exh. 26.) Respondent argues that
this lack of candor renders Mr. Sherman's testimony questionable. However, Mr. Sherman testified truthfully at
the hearing: he conceded he had not been truthful but had an explanation: that although another dealer had been
selected, he thought he still could change VWoA's mind. This event may have impacted his relationship with the
City, but does not completely taint Mr. Sherman's testimony in this hearing.

⁵⁶ RT Jan. 18, pp. 53-54.

⁵⁷ R. Exh. 10.

⁵⁸ Jt. Stip. Fact 7; Prot. Exh. 72.

1 site which was visible from the I-10 Freeway with relatively close proximity to freeway
2 access.⁵⁹ Mr. Sherman declined the offer of additional time.

3 60. Three applicants were considered by VWoA for the Montclair Open Point: Mr.
4 Sherman; the Penske Group; and the Metro Autogroup. All three applications were evaluated
5 on criteria including past performance, facility, diversity, and the all-important location.⁶⁰ The
6 Western Region made a recommendation to select the Metro Autogroup.⁶¹

7 *The Expert Opinions*

8 61. Mr. Farhat, the expert for VWoA, is Vice President of Expert Services, Urban
9 Science Applications, Inc. (“Urban Science”).⁶² Urban Science is a consulting company which
10 works with the automotive industry and other industries to offer business solutions.⁶³

11 62. Urban Science assists its clients with “dealer network planning”, which
12 determines the appropriate number of dealerships, and the appropriate location of those
13 dealerships, as well as the “measurement of the operations” of the dealerships.⁶⁴ Mr. Farhat
14 performed an analysis of the Montclair RMA to determine if VWoA had adequate
15 representation, whether the additional dealership was necessary, and what might be the impact
16 on Ontario VW and the consuming public if the Montclair dealership is established.⁶⁵

17 63. Protestant’s expert, Mr. Roesner, is the President of the Fontana Group, a
18 consulting firm that specializes in the automobile industry.⁶⁶

19 64. Mr. Roesner’s analysis examined the location of dealers relative to opportunities
20 for registrations, the number of dealers in a market, where the dealers are located, and whether
21 there is sufficient opportunity for a dealer to make a profit.⁶⁷

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23
24 ⁵⁹ RT Jan. 19, p. 28.

25 ⁶⁰ RT Jan. 18, pp. 81; Jan. 19, p. 96; Prot. Exh. 66.

26 ⁶¹ RT Jan. 19, p. 12; Prot. Exh. 66.

27 ⁶² RT Jan. 13, p. 79; Jt. Exh. 44, Statement of Education and Experience.

28 ⁶³ RT Jan. 13, p. 73.

⁶⁴ RT Jan. 13, p. 74.

⁶⁵ RT Jan. 13, p. 82.

⁶⁶ RT Jan. 12, p. 5; Jt. Exh. 42, Tab 1, Statement of Education and Experience.

⁶⁷ RT Jan. 12, pp. 7– 8.

65. Both experts utilized much of the same data from the same sources: 2000 Census information, VWoA statistics, and data purchased from private specialists, such as Polk and Claritas.⁶⁸

66. VWoA dealers are assigned Primary Areas of Influence (“PAI”) which are geographical areas containing census tracts nearest each dealer, but not beyond 20 miles.⁶⁹ Each census tract has approximately 4,000 people.⁷⁰ Each PAI is unique to its dealer; the Ontario PAI will not change if the Montclair dealership is established.⁷¹ Five PAIs are in the Riverside-San Bernardino market, an area defined by VWoA.⁷²

67. The RMA is a statutory construct - a 10 mile radius from the proposed new dealership.

68. The RMA may contain portions of several PAIs. In this case, the Montclair RMA contains portions of the PAIs of four existing dealers plus the PAI for the proposed Montclair dealership. The four existing Volkswagen dealers are Ontario VW, Cardinale Way VW in Corona, Bozzani VW in Covina, and Puente Hills VW.⁷³ Although only Ontario VW is physically located within the RMA and has the right to protest, there are four existing Volkswagen dealers whose PAIs include some portion of the RMA and who have a responsibility assigned to them by VWoA for the marketing of Volkswagen vehicles in a

⁶⁸ RT Jan. 13, pp. 89 – 91. At the time of his testimony, Mr. Mears was a VWoA employee who had been removed from his position as Regional Director, Western Region in July 2010. Protestant attempts to discredit Mr. Mears’s testimony by linking evidence of false reporting of car sales to his termination; although there is a temporal link that is insufficient to totally discredit Mr. Mears’s testimony.

Mr. Mears denied being involved in any scheme to falsely report cars. (RT Jan. 19, p. 127.) His denial is, in part, contradicted by the more credible testimony of Mr. Smith.

Mr. Smith explained that “punching cars” is slang for reporting vehicle sales. (RT Jan. 20, p. 131.) A report can be “false” if real retail sales have not been made. (RT Jan. 20, pp. 133-134.) In June 2010, the Western Region decided to capture incentive money by reporting a number of vehicles which had not actually been sold. (RT Jan. 20, p. 134.) Area 52 had less than 20 vehicles incorrectly or “falsely” reported, and some dealers were charged back for the incentive money when the car was actually sold. (RT Jan. 20, p. 135.)

Protestant’s argument, that the “false reports” corrupt the analysis of VWoA, is not supported. As quickly as it removed Mr. Mears from his position, VWoA made corrections when vehicles were actually sold, according to Mr. Smith. Moreover, any “corruption” would impact Mr. Roesner’s calculations also, since he indicated he utilized VWoA statistics.

⁶⁹ RT Jan. 12, pp. 28, 29.

⁷⁰ RT Jan. 12, p. 21.

⁷¹ RT Jan. 13, p. 96.

⁷² Jt. Exh. 44, p. A-1, incorporated herein as Attachment 2 (“CA, Riverside-San Bernardino, PAI Map”).

⁷³ Jt. Exh. 44, p. A-5, incorporated herein as Attachment 3 (“CA, Riverside-San Bernardino, +10 Mile RMA Census Tracts”); Declaration of Joseph F. Roesner [on Remand], Tab 22, p. 1, incorporated herein as Attachment 4.

1 designated portion of the RMA and for providing customer care to Volkswagen owners in a
2 designated portion of the RMA.

3 69. Both experts considered cross-sells, which look to see if the address at which the
4 vehicle is registered is within or outside of the area assigned to the selling dealer.⁷⁴ Ontario
5 VW, for example, makes most of its sales in the Riverside-San Bernardino market (397 of 597
6 December 2009 YTD), but Bozzani VW only makes 20% of its sales in the market, leading Mr.
7 Farhat to conclude that Bozzani VW is not part of the Riverside-San Bernardino market.⁷⁵ This
8 analysis is based on actual data, and Mr. Farhat concludes that the Riverside-San Bernardino
9 market as defined by VWoA is a valid market.⁷⁶

10 70. In order to determine if the VWoA brand is being adequately represented in the
11 Montclair RMA, Mr. Farhat compared the market share of VWoA in the RMA with the market
12 share of VWoA in California. Mr. Roesner performed a similar analysis but used the Western
13 Region of VWoA, which Mr. Farhat agrees is a more conservative standard.

14 71. Brand representation, or market penetration, is the ratio of Volkswagen vehicle
15 sales compared to sales of the primary competitive group brands.⁷⁷ For every 100 sales
16 nationally, Volkswagen sales are 6.61%. For every 100 sales in California, Volkswagen sales
17 are 7.76%. For every 100 sales in the Western Region, Volkswagen sales are 7.80%.⁷⁸

18 72. Performance standards are adjusted for consumer preferences in the local
19 market. Segmentation analysis adjusts for these differences by separating all new vehicles sold
20 and registered in the marketplace into segments of like vehicles. Like vehicles refer to physical
21 and performance characteristics, as well as consumer perception and are named by size, price
22 and function. For example, the new Volkswagen Passat and the Toyota Camry are in the
23 midsize sedan segment.⁷⁹

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26 ⁷⁴ Jt. Exh. 42, Tab 11; Jt. Exh. 44, pp. A-3, A-4.

27 ⁷⁵ RT Jan. 13, p. 100; Jt. Exh. 44, pp. A-3.

28 ⁷⁶ RT Jan. 13, 108.

⁷⁷ Jt. Exh. 44, p. A-7.

⁷⁸ Jt. Exh. 44, p. A-7.

⁷⁹ Jt. Exh. 44, p. A-9.

1 73. Mr. Farhat disagrees with the opinion of Mr. Roesner concerning segmentation.
2 Mr. Roesner is of the opinion that factors beyond statistical segmentation, such as income and
3 ethnicity, may be depressing VWoA's performance in the Montclair RMA.⁸⁰

4 74. Mr. Farhat analyzed income figures, and the median household income in the
5 Riverside-San Bernardino market is \$62,000. In the Riverside-San Bernardino market,
6 registration effectiveness is only 74.5% of the expected registrations. Other markets, such as
7 Sacramento and Murrieta, with comparable median household incomes perform better than
8 Riverside-San Bernardino, so Mr. Farhat concluded that income was not the cause of
9 inadequate Volkswagen sales.⁸¹

10 75. Ontario VW's PAI is 60% Hispanic, so Mr. Farhat reviewed Hispanic
11 populations in California and determined that Hispanic ethnicity does not explain inadequate
12 Volkswagen sales.⁸² Other areas with significant populations of Hispanic ethnicity perform
13 better.

14 76. The foreclosure rate in the Riverside-San Bernardino market is the fifth highest in
15 California.⁸³ However, Mr. Farhat's analysis determined this was not the cause of inadequate
16 Volkswagen sales because the seven other California markets with comparable foreclosure
17 rates performed better than Riverside-San Bernardino (those seven markets with comparable
18 foreclosure rates averaged 88% of the expected registrations; the Riverside-San Bernardino
19 market was 74.5% of the expected registrations).⁸⁴

20 77. Evidence was presented that addressed whether the shortfall in Volkswagen
21 registrations in the Riverside-San Bernardino market (compared to the averages as computed
22 by VWoA) was due to: lower household income; ethnicity of the population; high foreclosure
23 rate; or high unemployment. It was undisputed that the Riverside-San Bernardino area has
24 lower household incomes, and that a high percentage of the population is Hispanic. Also, and
25 perhaps more important, the market also has the highest unemployment rate, not only in

26 ⁸⁰ RT Jan. 13, pp. 125-126.

27 ⁸¹ RT Jan. 13, pp. 129 – 130; Resp. Exh. 60, p. A-34.1; Resp. Exh. 61, App.103.1.

28 ⁸² RT Jan. 13, pp. 131 – 133; Resp. Exh. 60, pp. A-34.3, A-34.4.

⁸³ Resp. Exh. 61, App. 103.7; Jt. Exh. 43, Supp. Tab. 47, p. 8.

⁸⁴ RT Jan. 13, p. 134; Jt. Exh. 44, App.103.7.

1 California but in the United States, as well as the highest home foreclosure rate not only in
2 California but in the United States. The evidence presented by VWoA purported to negate
3 several of these factors as explanations for the below-average numbers of Volkswagen sales.
4 However, there is no doubt that these factors make the Riverside-San Bernardino market a
5 challenging market for the sale of new vehicles. In addition, it is logical to conclude that the
6 reasons for an area with these demographics to perform below average in sales are: low
7 household income; a high rate of unemployment; a high home-foreclosure rate; low educational
8 levels, etc. It is not reasonable to conclude that the “below-average” sales penetration is due
9 solely to the absence of a dealership in the Montclair market. Further, the economic recovery
10 in the Riverside-San Bernardino area is not progressing as rapidly (if at all) as compared to
11 other areas of California or the country.⁸⁵

12 78. Respondent claims that if VWoA is not selling new vehicles at least at the
13 expected average, other brands will fill the sales opportunities. The analysis of VWoA’s
14 performance, not only in the Montclair RMA, but also in the Riverside-San Bernardino market,
15 as compared to California, reveals a significant shortfall⁸⁶ as compared to VWoA’s
16 expectations and comparisons to averages. Registration effectiveness, as measured by VWoA,
17 in the Riverside-San Bernardino market is only 75%. According to Respondent, this means
18 VWoA dealers in the Riverside-San Bernardino market are 25% below the average level of
19 performance of California VWoA dealers. Mr. Farhat’s analysis brought him to the conclusion
20 that there is a shortfall in registrations in the RMA; therefore, VWoA is not adequately
21 represented.⁸⁷ However, as stated above and as urged by Protestant, VWoA’s use of averages
22 for measuring performance in a market and declaring that the market is below average *is not*
23 *necessarily an appropriate measure* for determining whether another dealership is needed or
24 what the effect would be upon the relevant market area if an additional dealership was
25 established.

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27 ⁸⁵ Declaration of Joseph F. Roesner, Remand Report, Tab 16; Second Declaration of Earl Reed on Remand.

28 ⁸⁶ Jt. Exh. 44, pp. A-17, A-19, A-20.

⁸⁷ RT Jan. 13, p. 141.

1 79. As Respondent contends, one potential reason for lost opportunities may be
2 related to a high population which is exposed to brands other than VWoA. The Montclair auto
3 mall houses several of VWoA's primary competitive groups, including Honda and Nissan, and
4 a Toyota dealer is close by on the I-10 Freeway. The City of Montclair's population is 38,500
5 and is projected to increase in the immediate future to 40,000.⁸⁸ Between 1990 and 2010, the
6 Riverside-San Bernardino market had an increase of 208,000 households.⁸⁹ The Montclair
7 RMA is projected to grow by 16,000 households in the next five years.⁹⁰ The Ontario PAI is
8 projected to grow by 14,000 households by 2015.⁹¹ However these projections may not take
9 place. Even if those households are added, it does not mean that an additional dealer is
10 necessarily needed in the RMA. It may be that this growth will enable the existing four dealers
11 whose PAIs are within the RMA to achieve greater sales and remain viable despite the
12 economic difficulties in the Riverside-San Bernardino market that do not exist in the majority
13 of other markets in California.

14 80. Again, because of other circumstances, the employment levels in this market
15 area are unlikely to increase as rapidly as in other areas. But, if they do there is still no need to
16 increase the number of Volkswagen dealerships in the RMA.

17 81. An additional factor to consider is median income. Median income for a
18 Volkswagen buyer is \$80,000.⁹² A census tract has approximately 4,000 households. Mr.
19 Roesner expressed concern because along the I-10 corridor in Montclair and Ontario, the
20 median income level is less than \$25,000, with a number of census tracts at \$50,000 to
21 \$75,000.⁹³ Again, the lower median income is but one factor, which alone may not explain the
22 low sales penetration. However, it is another factor which can be analogized to the "perfect
23 storm" of factors that exist in the RMA and indicate that an additional dealership in the RMA is
24 more apt to cause economic troubles for the dealers whose PAIs are partly in the RMA.

25 ⁸⁸ RT Jan. 19, pp. 132, 134.

26 ⁸⁹ RT Jan. 13, pp. 146-148; Jt. Exh. 44, p. A-25. Households may be a better indicator of potential sales because
members of households often pool their financial resources to purchase cars.

27 ⁹⁰ Jt. Exh. 44, p. A-27.

28 ⁹¹ Jt. Exh. 44, p. A-29.

⁹² RT Jan. 13, p. 157.

⁹³ RT Jan. 12, p. 43.

1 Because of these several factors, there is a stronger likelihood that the possible benefit of the
2 additional dealership will be far outweighed by the possible harm not only to the Protestant but
3 also the other three dealers responsible for the RMA, with the harm to them resulting in a
4 “trickle-down” effect upon the public if any one (or more) of the existing dealers ceases to
5 exist. It is possible that the establishment of an additional dealer will increase sales in the
6 RMA but that the increase could be a short-term spike in sales (at least in the Montclair PAI)
7 followed by what may be “ruinous competition” that leaves only two or three dealerships to
8 serve the RMA. The effect of the loss of one or more profitable dealerships over the long term
9 would then be less competition within the RMA.

10 82. Protestants evidence submitted following remand from the Sacramento Superior
11 Court demonstrates that the area around Ontario and the proposed point continues to maintain a
12 lower median income than other parts of the market. Yet Volkswagen and its expert have
13 proposed that every census tract that performs below California average represents real, lost
14 opportunity that will be captured by a new point. As by the example addition of Puente Hills
15 Volkswagen and Moreno Valley Volkswagen, that has not happened in this market. Not all
16 census tracts nor all markets in California are going to perform at exactly the same level. To the
17 extent some markets are above average, others will be below.⁹⁴

18 83. There are demographic and socio-economic reasons why individual markets vary
19 and VWoA’s segmentation adjustment does not account for all differences. In California, the
20 coastal markets tend to have higher penetrations for Volkswagen than do the interior markets
21 such as the RSB Market. This is true not just for the Inland Empire but throughout California.⁹⁵

22 84. Volkswagen tends to be more popular in areas that have a higher level of
23 educational attainment. Over 55% of the variation in PAI registration effectiveness is explained
24 by the percentage of population age 25 and older that has obtained at least a Bachelor's Degree.
25 In California markets with a large percentage of Hispanic population, Volkswagen has tended to
26 not perform as well. Not every factor is accounted for by Volkswagen when they claim that, but

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28 ⁹⁴ Declaration of Joseph F. Roesner following Remand from the Superior Court, para. 25; Tab 24.

⁹⁵ Declaration of Joseph F. Roesner following Remand from the Superior Court, para. 26; Tab 25.

1 for too small a dealer network, these markets should achieve a minimum of California average.
2 The existing circumstances demonstrate the reasons why the Inland Empire does not register the
3 average number of Volkswagens and, as has been the case in the past, adding a dealership in
4 this market is not going to change that.⁹⁶

5 85. While statewide employment rates have improved somewhat from their lows, the
6 unemployment rate in RSB Counties is still very high. According to the March 22, 2013,
7 Bureau of Labor Statistics News Release, Riverside-San Bernardino-Ontario had the highest
8 unemployment rate in the U.S. among the 49 metropolitan areas with 1 million or more in
9 population.⁹⁷

10 86. Mr. Farhat and Mr. Roesner agree that the automobile industry was down as
11 much as 50% between 2008 and 2010, but the VWoA brand was able to hold its own in that
12 economy.⁹⁸ As the automobile industry revives, Mr. Roesner suggests that VWoA will not gain
13 as much as other brands, because building a plant in Tennessee to produce a new Passat will
14 not guarantee sales at the rate VWoA is projecting.⁹⁹ Even if there is a rise in sales as predicted
15 by VWoA nationally, that does not mean that will be the case in the RMA at issue. In addition,
16 Mr. Roesner points out that other brands are actively seeking to increase market shares. On
17 remand Mr. Roesner notes that VWoA's market share rose in 2011, in part because the
18 earthquake in Japan made it difficult for Japanese brands to provide vehicles to the United
19 States market. However, Mr. Roesner believes this gain is short term and will not continue
20 once Japanese brands recover.¹⁰⁰ This is in contrast to Mr. Farhat, who is of the opinion that
21 VWoA is in a position to gain as much, or more, by its ability to keep dealers and consumers
22 interested in its products.¹⁰¹ This opinion is speculative, and depends on an assumption that the
23 VWoA vehicles are of better quality and more desirable than their Japanese competitors. While
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⁹⁶ Declaration of Joseph F. Roesner following Remand from the Superior Court, para. 27; Tab 26.

⁹⁷ Declaration of Joseph F. Roesner following Remand from the Superior Court, para. 28; Tab 27.

⁹⁸ RT Jan. 13, p. 162.

⁹⁹ RT Jan. 13, p. 163.

¹⁰⁰ Reply Declaration of Joseph F. Roesner on Remand, para. 3e.

¹⁰¹ RT Jan. 13, p. 163; Jt. Exh. 44, p. A-40.

1 this may be true, it cannot be assumed one way or another. This Board reaches no conclusion
2 about quality, thereby negating possible gains by a temporary void in the marketplace.

3 87. Brand visibility, by having a VWoA dealer on the I-10 Freeway, would
4 significantly increase both intrabrand and interbrand competition.¹⁰² The proposed location for
5 the Montclair dealership is in an auto mall which has Honda and other brands which are
6 primary competitors of Volkswagen. The extent to which the Honda dealership would
7 compete against the intended Volkswagen dealership cannot be determined as, if the
8 Volkswagen dealership is established, both dealerships would have common ownership.

9 88. The next analysis by Mr. Farhat involved determining that there should be 3.9
10 VWoA dealers in the Riverside-San Bernardino market to meet or exceed the California
11 represented average.¹⁰³ Mr. Roesner's analysis indicates 4.2 dealers are necessary.¹⁰⁴ Both
12 experts agreed that four VWoA dealers in the Riverside-San Bernardino market would meet or
13 exceed the California represented average. However, the fact that VWoA has already
14 established two additional dealers in the RSB Market now means the market is *above* the
15 California average by one dealer. If the proposed Montclair dealer is permitted, VWoA would
16 then have *two* dealers above and beyond the California average *in one of the worst markets for*
17 *Volkswagen vehicles in the state of California.*

18 89. The Board is charged with considering the effect upon the retail motor vehicle
19 business and the consuming public in the "relevant market area." The RMA currently has one
20 Volkswagen dealer within it, but it also has three other Volkswagen dealers whose assigned
21 PAIs currently cover the entire RMA. That makes four Volkswagen dealers already serving the
22 RMA and the question is whether there should be a second Volkswagen dealership established
23 at the proposed address in Montclair (the epicenter of the RMA) which would mean that there
24 would be *five* Volkswagen dealerships designated by VWoA as being responsible for serving
25 the RMA .

26 ¹⁰² Intrabrand competition is where dealers of the same line-make, i.e., Volkswagen, are competing with each other.
27 (RT Jan. 12, p. 74) Interbrand competition is where dealers of a different line-make, such as Toyota and Honda are
competing with each other. (RT Jan. 14, p. 111)

28 ¹⁰³ Jt. Exh. 44, p. A-41.

¹⁰⁴ Jt. Exh. 43, Supp. Tab 44, p. 2.

1 90. Mr. Roesner concludes that because there are a lot of Volkswagen sales in and
2 around Montclair, this will significantly impact Ontario VW. The “dots” for registrations and
3 the density of population as well as the household income are all clustered in or closer to the
4 Montclair location than to the Ontario VW location.¹⁰⁵

5 91. A dealer’s ability to penetrate a market is influenced by the customer’s distance
6 from the dealer. Mr. Roesner concludes that proximity is only one factor in analyzing the
7 effectiveness of a dealer. But in his analysis he believes that the closer the customer lives to a
8 dealership, the more likely that customer is to visit.¹⁰⁶ Mr. Farhat’s analysis indicates that after
9 8 miles, for whatever reason (roads, competition from other brands), a dealer cannot be
10 expected to reach a high level of penetration.¹⁰⁷

11 92. One measure of customer convenience can be determined by measuring the
12 average distance to the nearest Volkswagen dealer, or alternatively, by measuring the average
13 time it takes to drive that distance.¹⁰⁸

14 93. In the Montclair PAI, the average distance to the nearest VWoA dealer is 8.2
15 miles.¹⁰⁹ By contrast, the average distance to the nearest Honda dealer and the nearest Toyota
16 dealer is 4.4 miles; to the nearest Nissan dealer 4.5 miles.¹¹⁰

17 94. Mr. Roesner provides drive time in minutes between the proposed Montclair
18 dealer and Ontario VW. It takes between 14.8 and 16.4 minutes depending on traffic.¹¹¹

19 95. Mr. Farhat concludes that the market is too big. Based on convenience for the
20 customer, another dealer is necessary. Mr. Roesner’s analysis describes the loss of territory
21 which will eliminate Ontario VW’s proximity advantage, and he concludes that an additional
22 dealership will negatively impact Ontario VW’s performance.¹¹²

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24 ¹⁰⁵ Declaration of Joseph F. Roesner, Remand Report, Tab 4, pp. 1-3, incorporated herein as Attachments 6, 7, and
25 8, respectively.

26 ¹⁰⁶ RT Jan. 12, p. 32.

27 ¹⁰⁷ RT Jan. 13, p. 171.

28 ¹⁰⁸ Jt. Exh. 42, Tab 7, p. 2; Jt. Exh. 44, p. A-51.

¹⁰⁹ Jt. Exh. 44, p. A-51.

¹¹⁰ Jt. Exh. 44, p. A-51.

¹¹¹ Jt. Exh. 42, Tab 7, p. 1.

¹¹² Jt. Exh. 42, Tab 44.

1 96. If there is to be another VWoA dealer, it is important to analyze the impact on
2 other VWoA dealers and their viability. The reason another dealership is allegedly needed in
3 the Riverside-San Bernardino market is to capture lost sales. It would be a waste of resources
4 and would be harmful to the existing dealers within the RMA for VWoA to suggest the need
5 for another dealer location if the new “add point” would simply shift sales from one dealer to
6 another.¹¹³ In this case, it is plain to see that sales would be shifted from Ontario VW to the
7 new Montclair dealership.

8 97. Ontario VW has been in business since 1995. The evidence establishes that it is
9 a profitable and well-managed dealership. During the economic downturn that severely
10 impacted the automobile industry, Mr. Sherman took steps to protect his dealership by reducing
11 the number of employees, and lowering some wages and rent. In 2009, Mr. Sherman was able
12 to take a salary and a \$120,000 bonus.¹¹⁴ As stated below, Mr. Sherman is no longer taking a
13 salary.

14 98. At the initial hearing, Mr. Roesner provided calculations of lost profits for
15 Ontario VW should the Montclair dealership be established. The “Low Model” of lost net
16 profit, before tax, would be \$448, 909.¹¹⁵ The “High Model” would be a loss of \$727,100.¹¹⁶
17 However, Mr. Roesner agrees that a “good” dealer -- one who manages well -- can have an
18 impact on profitability. As to the “High Model” figure, Mr. Roesner conceded that this was a
19 worst case scenario, not what he was predicting the impact would be.¹¹⁷ Mr. Roesner’s analysis
20 of loss to Ontario VW is based upon actual data, and he declined to speculate on any sales
21 numbers which might be increased due to the new Volkswagen campaign, which he labels “pie-
22 in-the-sky.” This analysis does not take into account any additional profit Ontario VW might
23 make as a result of the new dealership, which, for example, would stimulate sales by increasing
24 brand awareness on the I-10 Freeway, and by possibly increasing advertising expenditures.

26 ¹¹³ RT Jan. 13, p. 179.

27 ¹¹⁴ Scheline Depo. pp. 51 – 52.

28 ¹¹⁵ Jt. Exh. 42, Tab 37, p. 2.

¹¹⁶ Jt. Exh. 42, Tab 37, p. 1.

¹¹⁷ RT Jan. 12, pp. 140 – 141.

1 99. Upon remand to the Board from the Superior Court, Mr. Roesner has conducted
2 an updated impact analysis that shows the potential impact to Ontario Volkswagen to be
3 significant greater following the addition of additional Volkswagen dealers in San Bernardino
4 and Moreno Valley. Mr. Roesner determined that if the proposed Montclair Volkswagen
5 dealership is established, it will impact Ontario Volkswagen's profitability by at least \$545,587.
6 In combination with the impact from the San Bernardino point, the impact could be as high as
7 \$1,253,679. Based on Ontario Volkswagen's current level of profitability the combined actions
8 are likely to result in an economically unsustainable situation for Ontario Volkswagen.¹¹⁸

9 100. Mr. Farhat argues that Mr. Roesner's impact analysis is essentially a "fixed pie"
10 analysis and that he does not believe that in the automobile industry the "pie" is fixed. He
11 contends that the pie increases in size because new business is available (such as the new
12 Passat), the brand is stimulated (by having a dealer with visibility on the I-10 Freeway), and
13 households increase, providing more opportunity.¹¹⁹ However, Mr. Roesner's impact analysis
14 provides a high and low end range of impact that does in fact account take into account the
15 potential for future market growth.¹²⁰

16 101. Mr. Farhat contends that Mr. Roesner's analysis is faulty because he
17 acknowledges growth in opportunity will occur. But he does not take that growth into account
18 in his analysis.¹²¹ Mr. Roesner has said there is a possibility of some increase in available sales
19 in the Riverside-San Bernardino market, particularly in the Montclair PAI. However, he does
20 not agree with the level of increases suggested by Mr. Farhat.¹²²

21 102. The evidence submitted on remand from the Sacramento Superior Court
22 demonstrates that Respondent's predicted growth for its dealers fell well short and VWoA's
23 dealer body is showing the ill effects. For example, the April Volkswagen Pacific Region
24 Dealer Web Conference included information on the average Volkswagen dealership's financial

25
26 ¹¹⁸ Declaration of Joseph F. Roesner following Remand from the Superior Court, para. 29 through 32, Tabs 28 and 29.

27 ¹¹⁹ RT Jan. 14, p. 17.

28 ¹²⁰ Declaration of Joe Roesner following Remand from the Superior Court, para. 32.

¹²¹ RT Jan. 14, p. 6.

¹²² RT Jan. 14, pp. 184-185.

1 performance for February 2013 year-to-date. The average Volkswagen dealership's profitability
2 throughout the country was off substantially compared to the same period one year earlier. In
3 the Pacific Region dealer profitability fell almost 60% from \$167,054 to \$67,353.¹²³

4 103. Nationally Volkswagen dealerships' return on sales fell from 2.0% to 1.2%. In
5 the Pacific Region the average return on sales went from 2.3% to 1.0%. In the LA Metro-South,
6 which includes Ontario Volkswagen, the average Volkswagen dealership's return on sales fell
7 from 2.2% to 0.3%. For the year-to-date only 55.0% of Pacific Region Volkswagen dealerships
8 were profitable. Only 45.5% of LA Metro-South Volkswagen dealerships were profitable for
9 the period.¹²⁴

10 104. An additional area of concern for Volkswagen dealers is the recent increase in
11 the percentage of Volkswagen vehicles that are being marketed as fleet. The number of fleet
12 vehicles increased dramatically in 2012 to 19.0%. If Volkswagen resorts to making its numbers
13 through the sale of fleet vehicles it could have long term repercussions on the brand's value in
14 terms of residual values.¹²⁵

15 105. There is little doubt that the U.S. economy has improved over the last few years.
16 However, this improvement has been far from robust. There are still significant concerns as
17 reflected by the latest job report. We are still not certain that economic growth will continue
18 into the future. If there are other "bubbles" that may pop, the current strength shown by the
19 automotive industry might be reversed. If that is the case, dealers such as Ontario Volkswagen
20 will be much less likely to weather any downturn if their markets have also been reduced with
21 the addition of other Volkswagen dealerships.¹²⁶

22 106. Relative to what would otherwise be expected, Ontario Volkswagen will be
23 impacted no matter what happens with Volkswagen sales volumes. While there is reason to
24 question Volkswagen's continued increases, if it were to increase, the unit impact on Ontario
25 Volkswagen would be even greater because a percentage loss of volume equates to more units

26
27 ¹²³ Declaration of Joseph F. Roesner following Remand from the Superior Court, para. 35; Tab 32 pp. 1 and 2.

¹²⁴ Declaration of Joseph F. Roesner following Remand from the Superior Court, para. 36; Tab 32 pp. 3 through 6.

¹²⁵ Declaration of Joseph F. Roesner following Remand from the Superior Court, para. 37; Tab 33.

¹²⁶ Declaration of Joseph F. Roesner following Remand from the Superior Court, para. 38; Tab 34.

1 as the anticipated volume increases. Also, on absolute basis, any potential growth in
2 Volkswagen sales is very unlikely to compensate for the sales lost to the San Bernardino and
3 Montclair dealers.¹²⁷

4 107. Mr. Roesner places heavy reliance on the situation with Puente Hills Volkswagen
5 in the City of Industry and Bozzani Volkswagen in Covina to support his contention that the
6 addition of a Montclair dealership will result in cannibalization of Ontario VW's sales.

7 108. In 2006, Puente Hills Volkswagen closed.¹²⁸ That closure permitted Bozzani
8 Volkswagen to capture sales from the Puente Hills PAI. In January of 2010, Puente Hills
9 reopened, which, according to Mr. Roesner, caused Bozzani's sales to decrease. Mr. Roesner
10 analogized this set of facts with what he concludes will happen if a Montclair dealership is
11 established: the Montclair dealership will take sales from Ontario VW in the same manner as
12 Puente Hills took sales from Bozzani. In addition, although Bozzani is not physically located
13 in the Montclair RMA, Bozzani's PAI, as assigned to it by VWoA, is partially within the
14 Montclair RMA, and is part of the retail motor vehicle business in the area that must be
15 considered by the Board in determining the potential effect of establishing a dealer in
16 Montclair. Bozzani's sales were affected by the re-opening of the Puente Hills dealership and
17 Bozzani's sales in that portion of the RMA, for which VWoA holds Bozzani contractually
18 accountable, will likely be affected by the establishment of a dealership in Montclair.

19 109. Mr. Roesner pointed out that there are many aspects which impact dealer
20 effectiveness and competence, and there is a wide variation in how well individual dealers
21 perform.¹²⁹ Mr. Bozzani testified that for the past two years he has not been concentrating on
22 his Volkswagen dealership but rather on his Kia dealership, and this has affected his ability to
23 be the best Volkswagen dealer.¹³⁰ Mr. Roesner did not take this into account in his report.¹³¹

24
25
26 ¹²⁷ Declaration of Joseph F. Roesner following Remand from the Superior Court, para. 39; Tab 35.

27 ¹²⁸ No competent evidence was provided by either party to explain why the dealer voluntarily terminated the
franchise.

28 ¹²⁹ RT Jan. 12, pp. 154 – 156.

¹³⁰ RT Jan. 11, p. 143.

¹³¹ RT Jan. 12, p. 160.

110. Although several VWoA employees mentioned that Mr. Sherman had “lost focus” recently, Mr. Sherman has evidenced a concern for his dealership, and management at the dealership is considered good.

111. At the initial hearing, Mr. Roesner testified that his analysis of VWoA’s proposal to establish a Volkswagen dealership in Montclair, concluded that it is premature to add an additional dealer at this time¹³² and although Volkswagen sales and registrations will increase in the next two to three years,¹³³ VWoA’s plans to increase sales in the United States by the numbers it projects is “pie in the sky”.¹³⁴ VWoA’s enthusiastic plans to increase sales may be overly optimistic at least in relation to the RMA at issue.

112. It is true that the automobile industry has had a resurgence since the collapse that occurred in 2008. Since 2008, Volkswagen has increased both its volume and its market share. However, it is important to note that both the automobile industry as a whole and individual brands are cyclical in nature. Volkswagen had its strongest years in the United States in the late 1960s and early 1970s. After that VWoA sales fell considerably to a low in 1993. Volkswagen has had recent increases but it is very probable that at some point the brand will again go into another downturn. When that happens, it will be much more difficult for the four existing dealers currently assigned responsibility of the RMA to survive the ruinous competition that will result from the addition of yet another Volkswagen dealership to the Riverside San Bernardino Market.¹³⁵

113. It is worth noting that the recent increases for Volkswagen are still far short of Volkswagen’s stated goal of 800,000 units in the U.S. by 2018.¹³⁶

114. The possibility of a downturn in Volkswagen's fortunes is illustrated based on January 2013 results. In California, Volkswagen achieved a market share of 4.1% in both 2011 and 2012. In January 2012 Volkswagen had a market share of 4.0%. Volkswagen's January 2013 market share fell considerably to 3.4%. Volkswagen's national market share showed a

¹³² RT Jan. 12, pp. 118- 119; 143.

¹³³ RT Jan. 12, p. 152.

¹³⁴ RT Jan. 12, pp. 121; 123.

¹³⁵ Declaration of Joseph F. Roesner following Remand from the Superior Court, para. 33; Tab 30.

¹³⁶ Expert Report of Joseph F. Roesner, para. 34; Tab 29.

1 slight decrease in January. One month does not in itself indicate a trend. However, it does
2 demonstrate the vulnerability of VWoA's projections.¹³⁷

3 115. Mr. Farhat concluded that there is sufficient lost opportunity to permit
4 establishment of the Montclair dealership without subjecting Ontario VW to ruinous
5 competition. Ontario VW is a viable, well-managed business. However, as noted above, Mr.
6 Farhat's "opportunity analysis" is not necessarily the appropriate standard by which to measure
7 performance and/or available opportunity in the Riverside-San Bernardino Market.

8 116. There will be an adverse effect upon Ontario VW if the proposed dealership in
9 Montclair captures significant sales within that area of the RMA. There will also be an
10 adverse effect on Ontario VW's business because of penetration into other areas by the
11 Montclair dealership in which both Ontario VW and the [new] Montclair dealership would be
12 selling vehicles, and obtaining service customers. Many, if not most, of the Ontario VW sales
13 registrations in the RMA are much closer to the Montclair PAI than to the Ontario PAI with the
14 difference attributable to the much more favorable demographics in that portion of the RMA in
15 which the Montclair PAI is situated.

16 **FINDINGS RELATING TO PERMANENCY OF INVESTMENT [SECTION 3063(a)]**

17 117. Mr. Sherman has been a Volkswagen dealer since 1995.¹³⁸

18 118 Ontario VW is located in the Ontario Auto Center, a mall which includes
19 Volkswagen's primary competitive brands.¹³⁹

20 119. In 2003, Mr. Sherman built what VWoA calls a Market Place Facility, Type
21 A.¹⁴⁰ The property is valued at \$1 million. The value of the property, facility, fixtures,
22 furniture, equipment, flooring, and money loaned by Mr. Sherman as operating capital is
23 approximately \$11 million.¹⁴¹

24
25
26 ¹³⁷ Declaration of Joseph F. Roesner following Remand from the Superior Court, para. 34; Tab 31.

27 ¹³⁸ RT Jan. 10, pp. 198, 199.

¹³⁹ RT Jan. 10, pp. 198, 199; Jt. Exh. 44, p. A-6.

¹⁴⁰ RT Jan. 10, p. 199; Jt. Stip. Fact 3.

28 ¹⁴¹ RT Jan. 10, pp. 108, 212, 213.

120. Ontario VW had 45 employees in September 2010. Due to a decline in the economy, this is a decrease from 53 and constitutes a 15% reduction in its personnel.¹⁴² In 2009, in light of the decline in the economy, most employees were required to take a pay cut, and the amount of rent was reduced.¹⁴³ In 2009, the total salary for Mr. Sherman and Mr. Reed was \$238,194, and Mr. Sherman's bonus was \$120,000.¹⁴⁴ Mr. Sherman testified that he does not, at this time, take a salary.¹⁴⁵ Ontario VW has been able to adjust for the downturn in the economy, and the business will likely remain viable. However, the Riverside-San Bernardino market is recovering more slowly than other areas of the nation and even more slowly than other areas in California.

121. Ontario VW's profit for 2008 was \$193,800; for 2009, \$328,000; estimated profit for 2010 is \$230,000 to \$240,000.¹⁴⁶ Upon remand from the Superior Court, the evidence submitted shows Protestant's 2012 profitability to be \$289,392, after LIFO adjustment.¹⁴⁷ Mr. Sherman testified that the value of Ontario VW will drop dramatically if the Montclair dealership is opened under the management of someone other than Shayco, Inc.¹⁴⁸ The investment of Ontario VW in the dealership is sizeable and permanent. Whether this investment will be negatively affected by the establishment of the proposed dealership in Montclair will depend upon the extent of lost sales by Ontario VW in the RMA.

**FINDINGS RELATING TO EFFECT ON THE RETAIL MOTOR VEHICLE BUSINESS AND
THE CONSUMING PUBLIC IN THE RELEVANT MARKET AREA [SECTION 3063(b)]**

122. The RMA in this case has within it what VWoA has designated as Primary Areas of Influence ("PAI"). The PAI is a geographical area identified by VWoA with each dealer or open point assigned its own and unique PAI. The PAI will be made up of census

¹⁴² RT Jan. 10, p. 207.

¹⁴³ RT Jan. 10, p. 209; RT Jan. 11, p. 218. Shayco, Inc. receives \$24,000.00 per month net profit on the lease. RT Jan. 11, p. 218.

¹⁴⁴ Scheline Depo. p. 51, 86.

¹⁴⁵ RT Jan. 11, p. 218.

¹⁴⁶ Jt. Exhs. 12, 14, 16.

¹⁴⁷

¹⁴⁸ RT Jan. 11, p. 70.

1 tracts nearest each dealer but will not extend beyond 20 miles.¹⁴⁹ Each census tract has
2 approximately 4,000 people.¹⁵⁰

3 123. PAIs are not exclusive to the assigned dealer - any Volkswagen dealer can sell
4 to residents in any PAI.

5 124. As indicated above, the RMA is a statutory construct, it encompasses an area
6 within a 10 mile radius from the proposed new dealership and it is the specific area that is the
7 focus of Section 3063(b). In this case, the Montclair RMA contains portions of the PAIs of
8 four existing Volkswagen dealers, which are Ontario VW, Cardinale Way VW in Corona,
9 Bozzani VW in Covina, and Puente Hills VW¹⁵¹ along with what VWoA has designated as the
10 Montclair PAI.¹⁵² This means that, although Ontario VW is the only dealership physically
11 located within the RMA with the right to protest, it is only one of the four dealers whose PAIs
12 include some portion of the RMA and who have a responsibility assigned to them by VWoA.
13 It is these four dealers who have been assigned PAIs by VWoA for the marketing of
14 Volkswagen vehicles in a designated portion of the RMA and for providing customer care to
15 Volkswagen owners in those designated portions of the RMA. All four of these dealers have
16 PAIs that not only abut the former Montclair PAI, but also extend into and are part of the
17 Montclair RMA.

18 125. Although VWoA has assigned dealers their own PAIs for various reasons, the
19 legislature has focused upon the RMA for determining market area. Section 3063(b) states that
20 the Board must consider the “effect on the retail motor vehicle business and the consuming
21 public in the relevant market area”. In this case, the “retail motor vehicle business... in the
22 relevant market area” includes not only Ontario Volkswagen but also those other three dealers
23 who are contractually assigned, and in various ways held responsible for, a portion of the
24 “relevant market area” by the franchisor. Although the other three dealers have no standing to
25 protest, their PAIs give them a “business presence” in the RMA. They also have a significant

26 ¹⁴⁹ RT Jan. 12, pp. 28, 29.

27 ¹⁵⁰ RT Jan. 12, p. 21.

28 ¹⁵¹ Jt. Exh. 44, p. A-5, incorporated herein as Attachment 3 (“CA, Riverside-San Bernardino, +10 Mile RMA
Census Tracts”); Declaration of Joseph F. Roesner [on Remand], Tab 22, p. 1, incorporated herein as Attachment 4.

¹⁵² Declaration of Joseph E. Roesner, Remand Report, Tab 22, p. 1.

1 interest in the RMA because of their contractual obligation to VWoA in regard to some
2 portions of the RMA. Therefore the other three dealers, and the customers they serve, along
3 with Ontario VW, together comprise “the retail motor vehicle business and the consuming
4 public in the relevant market area.”

5 126. The RMA is already served by the four existing Volkswagen dealers, each of
6 which are obligated by their contracts with VWoA to provide sales, service and parts to
7 Volkswagen customers and prospective customers within the RMA.¹⁵³ Protestant captures the
8 greatest volume of Volkswagen business in the RMA, but the other three Volkswagen dealers
9 also depend on the RMA for a percentage of their Volkswagen business, as they provide
10 coverage for the Volkswagen brand in the RMA and throughout the Montclair PAI and
11 RMA.¹⁵⁴ The existing four dealers combined to make 69.6% of all sales into the former
12 Montclair PAI.¹⁵⁵

13 **Sales within the Montclair PAI**

14 111. By the very definition of “relevant market area” in the Vehicle Code, the address
15 of the proposed dealership in the Montclair PAI, is the epicenter of the RMA.

16 112. The following are the sales made into the Montclair PAI by the four dealerships
17 whose PAIs are within the RMA:

18 113. As for the Montclair PAI, in 2009, Bozzani VW made 60 sales in the Montclair
19 PAI accounting for 12.8% of its total sales. Cardinale Way VW made 34 sales or 9.3% of its
20 total sales in the Montclair PAI, and Protestant captured 116 sales, representing 19.4% of its
21 total sales volume. Looked at another way, Bozzani VW, Cardinale Way VW and Protestant
22 made more than 70% of all Volkswagen sales within the Montclair PAI.¹⁵⁶ The sales made by
23 these dealers during this time period within the entire RMA is discussed below.

24 114. The Volkswagen dealership in Puente Hills was reopened in January 2010 and
25 now also

26 ¹⁵³ Declaration of Joseph E. Roesner, Remand Report, Tab 22, p. 1.

27 ¹⁵⁴ Declaration of Joseph E. Roesner, Remand Report, Tab 1.

28 ¹⁵⁵ Declaration of Joe Roesner Following Remand from the Superior Court, Tab 18.

¹⁵⁶ Declaration of Joseph E. Roesner, Remand Report, Tab 1, p. 1.

1 serves the RMA. This reopening in 2010 resulted in the four currently-existing Volkswagen
2 dealerships the PAIs of which are included within the Montclair RMA.¹⁵⁷

3 127. Through July 2010 year-to-date, the four dealers in the following chart
4 accounted for 76.8% of new Volkswagen sales in the Montclair PAI.¹⁵⁸ This chart illustrates
5 the New Volkswagen Retail Car and Light Truck Buyer Behavior Report for the Riverside -
6 San Bernardino Plus Fringe PAIs after Add Point, July 2010 year-to-date:¹⁵⁹

Dealership	Montclair PAI %
Puente Hills	10.1% of all Volkswagen sales in the Montclair PAI
Cardinale Way	10.1% of all Volkswagen sales in the Montclair PAI
Bozzani Motors	16.7% of all Volkswagen sales in the Montclair PAI
Ontario VW	39.9% of all Volkswagen sales in the Montclair PAI

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12 Again, what sales were made by these dealers during this time period within the entire RMA is
13 discussed below.

14 128. The Montclair Open Point was an unassigned since 2006, but has since been
15 eliminated with sales and service responsibility currently assigned to the existing four dealers
16 for sales and service by VWoA.¹⁶⁰

17 129. If the Montclair dealership is established, it will take at least 2 years to complete
18 its new facility.¹⁶¹ Therefore, it would not be ready to operate before 2014. However, there is
19 no evidence in the record that the proposed establishment will be acceptable to the franchisors
20 that are currently promised the land on which the Volkswagen dealership would be constructed.
21 As a result, permitting the proposed establishment to go forward might result in further
22 litigation.

23 130. According to Respondent, the reason another dealership is needed in the
24 Riverside-San Bernardino market is to capture lost sales.¹⁶²

25
¹⁵⁷ RT Jan. 11, p. 116.

26 ¹⁵⁸ Declaration of Joseph E. Roesner, Remand Report, Tab 1, p. 2.

27 ¹⁵⁹ Declaration of Joseph E. Roesner, Remand Report, Tab 1, p. 2.

28 ¹⁶⁰ Declaration of Joe Roesner Following Remand from the Superior Court, Tabs 12-13.

¹⁶¹ RT Jan. 18, pp. 91, 161.

¹⁶² Jt. Exh. 44.

131. While Protestant's expert agrees that the establishment of an additional Volkswagen dealer in the Riverside-San Bernardino Market would bring this area to the California represented average for Volkswagen dealers, he believes this is not the correct time.¹⁶³ Protestant continues to argue that the Inland Empire is "mired in a recession" and potentially headed for a double-dip recession.¹⁶⁴ Protestant also notes that experts have lowered estimates for 2011, 2012, and 2013 automobile sales, citing among other factors, weak consumer confidence.¹⁶⁵

132. Volkswagen dealers whose PAIs are part of the Montclair RMA have made these sales recently:

New Volkswagen Vehicle Sales into the Montclair RMA¹⁶⁶

Year	Ontario	%	Cardinale	%	Bozzani	%	Puente Hills	%
2009	217 ¹⁶⁷	40.5%	54	10.1%	124	23.1%	Not open	
2010	229	35.4%	60	9.3%	106	16.4%	73	11.3%
3/2011	62	35.8%	15	8.7%	25	14.5%	22	12.7%

As can be seen, the percentage of each dealer's sales in the RMA dropped upon the re-opening of Puente Hills VW in 2010. Ontario VW went from 40.5% in 2009 to 35.4% in 2010 and 35.8% in the first quarter of 2011. Cardinale Way VW went from 10.1% to 9.3% and 8.7%. Bozzani VW, the dealer nearest to the Puente Hills location, dropped in sales and also dropped in percentages from 23.1% to 16.4% and 14.5%.¹⁶⁸

133. Experts for both parties agree that "in-sell", where sales are made by a dealer whose physical location is outside the PAI where the sale is made, are to be expected.¹⁶⁹

¹⁶³ RT Jan. 12, pp. 118-119; 143.

¹⁶⁴ Declaration of Earl Reed [on Remand], para. 8; Second Declaration of Earl Reed on Remand, para. 3.

¹⁶⁵ Second Declaration of Earl Reed on Remand, para. 7, Exh. 22.

¹⁶⁶ Declaration of Joseph F. Roesner, Remand Report, para. 11, Tab 2, page 1.

¹⁶⁷ Ontario VW numbers differ slightly in JEX – Remand 1 ("Jt. Exh. – Remand 1"), which was prepared by the parties at the request of the ALJ. Jt. Exh. – Remand 1 is incorporated herein as Attachment 5.

¹⁶⁸ Declaration of Joseph F. Roesner, Remand Report, para. 11, Tab 2, page 1.

¹⁶⁹ RT Jan. 14, p. 108; Declaration of Joseph F. Roesner [on Remand], para. 51.

ONTARIO VW

134. The following chart illustrates Ontario VW's New Volkswagen Retail Car and Light Truck Sales Effectiveness in 2-Mile Rings around Ontario for 2009:¹⁷⁰

Radius in Miles	Ontario VW's Sales	Volkswagen Registration at Average*	Volkswagen Registrations	Ontario's Sales Effectiveness
0-2	3	7	5	42.9%
2-4	30	74	51	40.5%
4-6	74	181	114	40.9%
6-8	87	214	152	40.7%
8-10	62	192	137	32.3%
10-12	31	257	187	12.1%
12-14	24	241	183	10.0%
14-16	20	234	177	8.5%
16-18	16	235	167	6.8%
18-20	19	262	180	7.3%

* Average based on Volkswagen as a Percent of Primary Competitive Group by Segment in California Represented.

135. The following chart illustrates the proximity between Ontario VW and select Volkswagen dealers:

Air Distance in Miles Between Ontario VW and Select Volkswagen Dealers ¹⁷¹					
	Riverside	Cardinale Way	Bozzani Motors	Puente Hills	Montclair Add Point
Distance from Ontario	11.5	12.7	19.8	22.6	8.7
Half Distance from Ontario	5.8	6.4	9.9	11.3	4.4

136. Riverside, Cardinale Way, and Bozzani Motors are closer in proximity to potential customers than Ontario VW starting at 5.8 miles from Ontario VW. If the Montclair Volkswagen dealership is established it will have a proximate advantage beginning at 4.4 miles from Ontario VW. The establishment of the Montclair dealership will remove the opportunity available to Ontario VW outside of four miles.¹⁷² Given the close proximity of Montclair to

¹⁷⁰ Declaration of Joseph E. Roesner, Remand Report, Tab 5, p. 2.

¹⁷¹ Declaration of Joseph F. Roesner, Remand Report, para. 18-22; Tab 6, p. 1

¹⁷² Declaration of Joseph F. Roesner, Remand Report, para.23.

1 Ontario VW, and the lack of residential areas around Ontario VW, there is little sales
2 opportunity within four miles of Ontario VW and the establishment of Montclair will diminish
3 the opportunity outside of four miles that Ontario VW relies on.¹⁷³

4 137. Ontario VW has spent 15 years working to establish the Montclair PAI as part of
5 its market, it depends on that market, and it contends that if the Montclair dealership is
6 established, Ontario VW will suffer serious financial peril.¹⁷⁴ Mr. Roesner, Protestant's expert,
7 testified at the initial hearing that if the Montclair open point is filled, and either the Victorville
8 or Redlands point is filled, Ontario VW's business will decrease by more than 50%. In
9 addition, it will have no future opportunity to capture lost sales.¹⁷⁵ Therefore, Protestant
10 argues, the Board should not permit the Montclair open point to be filled. It should also be
11 noted that Ontario VW will not have protest rights if the Victorville or Redlands open points
12 are filled (see below).

13 138. Upon remand from the Superior Court of Sacramento County, Mr. Roesner has
14 submitted additional analysis demonstrating that The Volkswagen dealer network within
15 Riverside - San Bernardino has already, and is in the process of, expanding. Volkswagen of
16 Moreno Valley opened in late 2011 and a Volkswagen dealer is slated to open November 2013
17 in San Bernardino.¹⁷⁶

18 139. The addition of the San Bernardino Volkswagen dealership has significant
19 repercussions for this case. Ontario Volkswagen does not have protest rights relative to the San
20 Bernardino point. This dealership will be situated such that it will cannibalize much of Ontario
21 Volkswagen's business that comes from the east and from the Victorville area. The Montclair
22 area is already extremely important to the Ontario Volkswagen dealership and will become
23 even more critical starting in November 2013 when the San Bernardino dealership opens.¹⁷⁷

24 140. The new dealership, Volkswagen of Moreno Valley, is located to the southeast
25 of Ontario on State Highway 60. The San Bernardino Volkswagen dealership is to be located

26 ¹⁷³ Declaration of Joseph F. Roesner, Remand Report, para.23.

27 ¹⁷⁴ RT Jan. 11, p. 77; Declaration of Gary Sherman [on Remand], para. 2, Exh. A.

28 ¹⁷⁵ Declaration of Joseph F. Roesner [on Remand] para. 7 (d), (e), and (f), and 40-41.

¹⁷⁶ Declaration of Joseph F. Roesner following Remand from the Superior Court, para. 3; Tab 1.

¹⁷⁷ Declaration of Joseph F. Roesner following Remand from the Superior Court, para. 4.

1 just off of I-215 approximately one-half mile from I-10. If the Montclair Volkswagen point is
2 opened, Volkswagen will have representation in Covina (Bozzani Motors), Ontario and in
3 Montclair. Based on 2012 registrations, Volkswagen would be the smallest volume line make
4 with dealers in all three cities.¹⁷⁸

5 141. There are a number of Volkswagen dealerships that currently surround the
6 proposed Montclair point, with Ontario Volkswagen being the closest existing dealership to
7 that location. Of the existing Volkswagen dealerships, only Riverside is closer than Ontario to
8 the new Volkswagen of Moreno Valley location. The San Bernardino dealership opening later
9 this year is only 14.2 miles from the Ontario location.¹⁷⁹

10 142. VWoA's expert in this matter prepared Volkswagen sales projections using a 20-
11 mile ring around the dealership. Very little of the area from which the proposed Montclair
12 point will draw its sales is not already covered by Ontario Volkswagen. With the addition of
13 Volkswagen of Moreno Valley and the upcoming opening of the future point in San
14 Bernardino, there is already significant overlap of the areas from which each of the
15 Volkswagen dealerships draw their sales and service customers. The area from which the San
16 Bernardino store will draw its customers also substantially overlaps Ontario Volkswagen's area
17 further diminishing opportunities for Ontario.¹⁸⁰

18 143. The proposed Montclair Volkswagen point is within the current Ontario PAI, as
19 assigned by Volkswagen, and numerous census tracts currently assigned to Ontario will
20 become part of the Montclair Volkswagen PAI. Based on registrations, Volkswagen units-in-
21 operation, and population and household counts, from 30% to 40% of the PAI assigned to
22 Ontario will be lost to Montclair Volkswagen if it is established.¹⁸¹

23 144. VWoA and its experts argue that there will be no loss of business if the
24 Montclair point goes in. Their argument is solely based on the logic that every market in
25 California should perform at or above the California average. According to Volkswagen, if a
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27 ¹⁷⁸ Declaration of Joseph F. Roesner following Remand from the Superior Court, para. 5; Tabs 2 and 3.

¹⁷⁹ Declaration of Joseph F. Roesner following Remand from the Superior Court, para. 6; Tabs 4 and 5.

¹⁸⁰ Declaration of Joseph F. Roesner following Remand from the Superior Court, para. 7; Tab 6.

¹⁸¹ Declaration of Joseph F. Roesner following Remand from the Superior Court, para. 8; Tabs 7 and 8.

dealership is added it will draw solely from this "lost opportunity" that exists because there is not a dealer in the market. The logic is that the California average is a floor for performance so every market should be at least average but can actually do better than that. Of course this does not address the fact that to the extent some markets are above average others **have** to be below average.¹⁸²

145. In 2010, Puente Hills Volkswagen was added to this market. In late 2011 Volkswagen of Moreno Valley was added. The addition of these two dealerships did not increase Volkswagen registrations to California average. In 2012, the City of Industry PAI, in which Puente Hills is located, had Volkswagen registration effectiveness relative to California average of 65.07%. The Moreno Valley PAI had registration effectiveness relative to California average of 68.30%. With two more Volkswagen dealerships the Riverside-San Bernardino area as a whole had lower performance relative to California in 2012 (66.48%) than it did in 2009 (70.26%) before the two dealerships were added. VWoA's theory that the surrounding dealers would benefit due to additional brand exposure and the ability to concentrate on their own markets has been proven false. Instead of improving Volkswagen performance in the market, registrations are simply being split among two additional dealerships.¹⁸³

146. Without an increase in brand performance, the sales made by the new dealerships simply come at the expense of existing Volkswagen dealerships. The sales performance calculations for market dealerships during the period before and after the opening of the two dealerships in Puente Hills and Moreno Valley demonstrate that this is what happened in the Riverside-San Bernardino market. In 2012 not one dealership in or adjacent to the Riverside-San Bernardino market had sales performance relative to California average equal to its performance in 2008, 2009 or 2010, the years before the establishment of the new dealerships.¹⁸⁴

¹⁸² Declaration of Joseph F. Roesner following Remand from the Superior Court, para. 9.

¹⁸³ Declaration of Joseph F. Roesner following Remand from the Superior Court, para. 10; Tab 9.

¹⁸⁴ Declaration of Joseph F. Roesner following Remand from the Superior Court, para. 11.

1 147. Bozzani Motors is the closest dealership to the Puente Hills location. When this
2 dealership was added Bozzani's sales decreased dramatically relative to the California average.
3 If Bozzani Motors had maintained its pre-Puente Hills relative level of sales it would have
4 made 351 more new retail Volkswagen sales than it actually did in 2012.¹⁸⁵

5 148. Following the opening of Moreno Valley Volkswagen, Riverside Volkswagen's
6 new retail sales decreased substantially relative to sales levels before the opening of the
7 dealership 13.9 miles away. Riverside Volkswagen made 396 fewer sales in 2012 than it
8 would have made had it maintained its 2010 sales performance level.¹⁸⁶ Neither of these
9 dealers was able to make up the lost sales by "focusing on their own PAIs." In both PAIs the
10 2012 registration effectiveness remained similar to that which existed before the opening of the
11 nearby point. Volkswagen of Moreno Valley's service business primarily came from existing
12 Volkswagen dealers with Riverside Volkswagen enduring the largest cannibalization from the
13 new dealer.¹⁸⁷

14 149. On the basis of both drive distance and drive time, Ontario Volkswagen is
15 currently the closest dealership to the proposed Montclair point, a large part of San Bernardino
16 and the majority of the Victorville area. Once the future point in San Bernardino is established
17 in November 2013, Ontario will lose its proximity advantage to a large portion of the
18 geography to the east of the dealership. It is also the case that, because of the highway network
19 and the San Bernardino point's proximity to I-215, Victorville will become more proximate to
20 the San Bernardino Volkswagen store than it is to Ontario. Both San Bernardino and
21 Victorville are currently important sources of business to Ontario that will be lost starting in
22 November 2013. If the Montclair point is allowed to open, the area most proximate to Ontario
23 Volkswagen will only be a fraction of what is now closest to the dealership.¹⁸⁸

24 150. In terms of competition between same line-make dealerships, proximity does
25 make a difference to consumers. Dealerships will tend to sell more Volkswagens than other

26
27 ¹⁸⁵ Declaration of Joseph F. Roesner following Remand from the Superior Court, para. 12; Tab 10 p. 1.

¹⁸⁶ Declaration of Joseph F. Roesner following Remand from the Superior Court, para. 13; Tab 10 p. 2.

¹⁸⁷ Declaration of Joseph F. Roesner following Remand from the Superior Court, para. 13; Tab 11.

¹⁸⁸ Declaration of Joseph F. Roesner following Remand from the Superior Court, para. 14; Tabs 12 and 13.

1 Volkswagen dealerships in the areas that are more proximate to them. Currently Ontario
2 Volkswagen tends to sell more vehicles than its competitors in the areas to which it is most
3 proximate. The sales advantage for Ontario Volkswagen in both San Bernardino and
4 Victorville will likely end once the future point in San Bernardino opens. At that point, the
5 area around Montclair will become even more critical to Ontario Volkswagen's survival. If the
6 Montclair point is then filled, the loss of business to Ontario Volkswagen would be
7 devastating.¹⁸⁹

8 151. A large percentage of Ontario Volkswagen's new, used and service customers
9 come from the Montclair RMA. The other areas of business for Ontario Volkswagen are to the
10 east and northeast, areas to which Ontario Volkswagen will lose advantage beginning in
11 November 2013. Another factor that can be seen from these maps is that the area within a few
12 miles of Ontario Volkswagen provides relatively few sales opportunities to the dealership. For
13 most dealerships the area within a few miles is the easiest from which to draw customers
14 relative to its same line-make competitors. For Ontario Volkswagen, this area has heavy
15 commercial development with little residential development thus, fewer sale opportunities.
16 The households and corresponding registrations are sparse around Ontario Volkswagen which
17 makes the area around Montclair even more important to the Ontario Volkswagen
18 dealership.¹⁹⁰

19 152. The two existing Volkswagen dealers that are closest to the proposed Montclair
20 point are Ontario Volkswagen and Bozzani Motors. Not surprisingly these are also the two
21 dealers that together make up the majority of Volkswagen business in the RMA. Each year
22 from 2005 to 2012, Ontario has sold from 29.9% to 40.5% of all the new Volkswagens
23 registered in the RMA. In the time period 2009 to 2/2013 YTD, Ontario Volkswagen sold from
24 22.2% to 42.3% of the certified pre-owned Volkswagens registered in the RMA. During that
25 same time period, Ontario completed from 42.2% to 46.6% of all Volkswagen repair orders
26

27 ¹⁸⁹ Declaration of Joseph F. Roesner following Remand from the Superior Court, para. 15; Tab 14.

28 ¹⁹⁰ Declaration of Joseph F. Roesner following Remand from the Superior Court, para. 16; Tabs 15 and 16.

1 performed on vehicles with RMA addresses had the work done at Ontario Volkswagen.
2 Clearly this is a very important area for Ontario Volkswagen.¹⁹¹

3 153. Ontario Volkswagen is the largest seller of Volkswagens registered in the
4 Montclair PAI. In 2012, Ontario Volkswagen sold 167 new retail Volkswagens that were
5 registered to addresses in the Montclair PAI. This was more than any other dealer and
6 represented 31% of all Volkswagens registered in the Montclair PAI. The 167 vehicles sold
7 represent 19.4% of Ontario Volkswagen's sales.¹⁹²

8 154. The San Bernardino PAI is currently very important to Ontario Volkswagen. In
9 2012, Ontario Volkswagen sold 103 new retail Volkswagens that were registered in the San
10 Bernardino PAI. This was 27.1% of all Volkswagens registered in that PAI and 12.0% of
11 Ontario Volkswagen's nationwide sales. In 2012, Ontario Volkswagen also sold 85 new retail
12 Volkswagens in the Victorville PAI. This represented 40.3% of all Volkswagens registered in
13 that PAI and 9.9% of Ontario Volkswagen's sales. Once the San Bernardino Volkswagen
14 dealership is established in November 2013, it will be in a more favorable position than Ontario
15 to capture business from both of these PAIs.¹⁹³

16 155. From 2005 to 2012 Ontario Volkswagen sold 1,045 new retail Volkswagens that
17 were registered in the Montclair PAI. This was 36.3% of all Volkswagens registered in the
18 Montclair PAI during that time period. The Montclair PAI was the source of 20.7% of all
19 Ontario Volkswagen's new retail sales from 2005 to 2012. The 1,045 vehicles was only one
20 more vehicle than Ontario Volkswagen sold into the combined San Bernardino and Victorville
21 PAIs. Beginning in November 2013 those two PAIs will be more proximate to the San
22 Bernardino Volkswagen dealership and Montclair will become even more important to Ontario
23 Volkswagen.¹⁹⁴

24 156. The Montclair PAI is also important to Ontario Volkswagen in regard to the sale
25 of certified pre-owned Volkswagens. Ontario Volkswagen is the largest seller of certified pre-

26
27 ¹⁹¹ Declaration of Joseph F. Roesner following Remand from the Superior Court, para. 17; Tab 17.

¹⁹² Declaration of Joseph F. Roesner following Remand from the Superior Court, para. 18; Tab 18 p. 1.

¹⁹³ Declaration of Joseph F. Roesner following Remand from the Superior Court, para. 19; Tab 18 p. 1.

28 ¹⁹⁴ Declaration of Joseph F. Roesner following Remand from the Superior Court, para. 20; Tab 18 p. 2.

1 owned Volkswagen vehicles registered in the Montclair PAI. In 2012, Ontario Volkswagen
2 sold 45 certified pre-owned vehicles that were registered in that PAI. The combined San
3 Bernardino and Victorville PAIs had registrations sold by Ontario Volkswagen totaling 54
4 vehicles but, as previously pointed out, future sales in these areas will be more likely to be
5 captured by the San Bernardino dealer when it opens in November 2013.¹⁹⁵

6 157. The Montclair PAI to Ontario Volkswagen is also important in regard to
7 generating service customers for the dealership. Ontario Volkswagen services more
8 Volkswagen vehicles with addresses within the Montclair PAI than any other dealership. In
9 2012, Ontario Volkswagen serviced 1,165 of the vehicles with addresses in that PAI. The
10 combined San Bernardino and Victorville PAIs generated slightly more service business for
11 Ontario Volkswagen than the Montclair PAI, but that will likely change dramatically when the
12 new San Bernardino dealership opens in November 2013. Once the San Bernardino dealership
13 opens, the Montclair PAI will be even more critical to Ontario Volkswagen as a source of
14 service and parts business.¹⁹⁶

15 158. With the addition of the San Bernardino point in November 2013, it is likely that
16 fewer of Ontario Volkswagen's customers will come from San Bernardino and Victorville.
17 Following that, the percentage coming from areas more proximate to Montclair will increase
18 dramatically. The proximity advantage is not an absolute advantage, i.e. not all of these sales
19 will be lost to the Montclair point. However, not all of Ontario Volkswagen's sales that remain
20 closer to Ontario will be retained. If established, Montclair Volkswagen can be expected to sell
21 not just in its own PAI, but also into the Ontario PAI, the San Bernardino PAI, the Riverside
22 PAI, and throughout the market. As long as it remains open, Ontario Volkswagen will also
23 continue to sell throughout the market, just to a lower extent than it otherwise would have. It is
24 not just Ontario Volkswagen's new retail Volkswagen sales that are at risk but also used,
25 certified pre-owned, warranty and customer pay service and related parts, and the wholesale
26 parts customers for Ontario Volkswagen. In fact, while for the other categories it is

27 ¹⁹⁵ Declaration of Joseph F. Roesner following Remand from the Superior Court, para. 21; Tab 19.

28 ¹⁹⁶ Declaration of Joseph F. Roesner following Remand from the Superior Court, para. 22; Tab 20.

1 approximately 30% of customers for which Ontario Volkswagen will lose a proximity
2 advantage, depending on the measure from 43.7% to 47.0% of Ontario Volkswagen's wholesale
3 parts customers will be closer to Montclair if that point is established.¹⁹⁷

4 159. As stated above, the percentages do not take into account the fact that the San
5 Bernardino point will be opening in November 2013. At that time the area most proximate to
6 Ontario will have between 25.4% to 38.8% fewer registrations based on drive distance or drive
7 time. This is a similar reduction to that which would come from just the addition of a
8 Montclair point (26.0% to 28.6% reduction) ignoring the reality of the upcoming San
9 Bernardino point. The effect of the two combined actions would be a reduction of Ontario
10 Volkswagen's area from 53.1% to 64.9%. When measured in terms of Volkswagen units-in-
11 operation, the combined reduction in Ontario Volkswagen's area ranges from 63.1% to 67.7%.
12 Because these are the vehicles that generate service and parts sales for the dealership, these two
13 actions together would have a dramatic impact on Ontario Volkswagen.¹⁹⁸

14 160. At this time, the record reflects that Victorville is an open point.¹⁹⁹ Volkswagen
15 has withdrawn its Letter of Intent with a candidate for the Victorville open point.²⁰⁰ No other
16 candidate for the Victorville open point has been identified.²⁰¹

17 161. Redlands is also an open point.²⁰² At this time there is no candidate to fill the
18 Redlands open point.²⁰³

19 162. Protestant contends that it consistently outperforms the market and has such a
20 high performance level that there are no areas to substantially improve to make up for the sales
21 that would be lost to the Montclair dealer.²⁰⁴

23 ¹⁹⁷ Declaration of Joseph F. Roesner following Remand from the Superior Court, para. 23; Tab 21.

24 ¹⁹⁸ Declaration of Joseph F. Roesner following Remand from the Superior Court, para. 24; Tab 22.

25 ¹⁹⁹ Supplemental Declaration of Anthony Ray on Remand, para. 2.

26 ²⁰⁰ Supplemental Declaration of Anthony Ray on Remand, para. 2.

27 ²⁰¹ Supplemental Declaration of Anthony Ray on Remand, para. 2.

28 ²⁰² Supplemental Declaration of Anthony Ray on Remand, para. 3.

²⁰³ Supplemental Declaration of Anthony Ray on Remand, para. 3; The opinion of Protestant's expert, Mr. Roesner, that there is a large probability that Volkswagen will fill the Victorville and Redlands open points simply because Ontario VW will not have standing to file a protest, is rejected; there is no evidence in the record to support this opinion. Roesner Remand Report, para. 57.

²⁰⁴ Declaration of Earl Reed [on Remand], para. 11.

163. On remand from the Board, Mr. Roesner offered another reason to support Protestant's position: the Coastal v. Inland Market Area theory. Mr. Roesner opines that the coastal dealership areas in California have higher average sales because, among other things, the surrounding population has more education, which results in technology-related and white collar professional careers.²⁰⁵ Inland dealerships have lower average sales because they are surrounded by a population which is less educated and holds blue collar jobs.²⁰⁶

164. Mr. Farhat and Mr. Roesner have differing opinions on the projected growth of Volkswagen sales. Mr. Farhat and Mr. Ray foresee increasing growth in volume, especially with the introduction of the redesigned Passat and redesigned Beetle. Mr. Roesner notes that recent Volkswagen growth can be attributed to the earthquake in Japan, which resulted in a reduction of inventory of Toyota, Honda, and other Asian brand inventory. This enabled Volkswagen, and other manufacturers, to temporarily increase sales.²⁰⁷ Mr. Roesner projects that Volkswagen sales will drop once the Asian markets have recovered.

165. The predicted slowing of VWoA's growth predictions is confirmed by the fact that VWoA's Jonathan Browning announced that VWoA lowered its 2013 sales objective from 472,000 to 451,000.²⁰⁸

BOZZANI VOLKSWAGEN

166. According to Greg Bozzani, Bozzani VW has captured a “significant amount” of business “in the Montclair market”.²⁰⁹

167. In January 2011, Mr. Bozzani testified that he hadn't analyzed how a potential Montclair dealership would affect his dealership, but he thought it would have an adverse effect on sales, service and parts.²¹⁰ On remand, Mr. Bozzani indicates that in addition to the unspecified amount of lost business in the Montclair market, he is concerned about lost sales, service and parts in the Covina PAI, which is where Bozzani VW is located.²¹¹

²⁰⁵ Declaration of Joseph F. Roesner, Remand Report, para. 45, Tab 16, p. 1.

²⁰⁶ Declaration of Joseph F. Roesner, Remand Report, para. 45, Tab 16, p. 1.

²⁰⁷ Reply Declaration of Joseph F. Roesner, para. 3a, 3b, 3c, 3d, and 3e.

²⁰⁸ Declaration of Earl Reed (on Remand from Sacramento Superior Court) para. 10.

²⁰⁹ Declaration of Greg Bozzani [on Remand], para. 6.

²¹⁰ RT Jan. 11, p. 119-120.

²¹¹ Declaration of Greg Bozzani [on Remand], para. 6.

168. Bozzani VW depends upon sales into the Montclair RMA because it feels pressured by the new Puente Hills dealership in the City of Industry PAI.²¹²

169. Mr. Bozzani testified that for the past two years he has not been concentrating on his Volkswagen dealership but rather on his Kia dealership, and this has affected his ability to be the best Volkswagen dealer.²¹³

170. If the Montclair dealership is established, there will be an increase in competition in the Montclair RMA and in the contiguous PAIs; however, this will likely occur to the detriment of all of the current Volkswagen dealers within the RMA.²¹⁴

PUENTE HILLS VW AND CARDINALE WAY VW

171. As indicated in the chart above in paragraph 127, Cardinale Way VW sold 54 new Volkswagen vehicles into the Montclair PAI in 2009 and 60 new Volkswagen vehicles in 2010. Puente Hills VW, when it reopened, sold 73 new Volkswagen vehicles in 2010 into the Montclair PAI.

172. Although there is no evidence of any substantial negative effect on these dealerships, it is likely that some of their customers that are in the Montclair PAI or elsewhere in the RMA will be lost and it is certain that the Montclair dealership would sell into the Puente Hills and Cardinale Way PAIs.

EFFECT ON CONSUMING PUBLIC

173. The Montclair RMA is projected to grow by 16,000 households in the next five years.²¹⁵ The largest growth is anticipated on the west end of the Inland Empire around Montclair.²¹⁶

²¹² Declaration of Greg Bozzani [on Remand], para. 5; Declaration of Joseph Roesner [on Remand], para. 9; Tab 1, pp. 1-2; As discussed above, Mr. Roesner's opinion that Puente Hills is cannibalizing sales from Bozzani is rejected because he omitted a material fact in his analysis - Mr. Bozzani's admitted inability to be the best Volkswagen dealer. From this flawed example, Mr. Roesner concludes that a Montclair dealership will equally impact Ontario VW; as discussed above, this conclusion is rejected because unlike Mr. Bozzani, Mr. Sherman has not been distracted by his other dealership.

²¹³ RT Jan. 11, p. 143.

²¹⁴ RT Jan 10, p. 210-211; RT Jan 11, pp. 27, 120-121.

²¹⁵ Jt. Exh. 44, p. A-27.

²¹⁶ RT Jan. 19, pp. 135-136.

174. The average distance in the Montclair PAI to the nearest Volkswagen dealership is 8.2 miles; if the Montclair dealership is established 8.65 to 8.7 air miles away from Protestant, it will be reduced to less than 4.5 miles.²¹⁷

175. The shortest surface route in miles between Ontario VW and the proposed Montclair dealership is 10 miles; the shortest surface route in minutes is 14.8 to 16.4 minutes.²¹⁸

176. Consumers would enjoy increased convenience with the establishment of an additional Volkswagen dealership. However, this would only be true so long as the existing dealers remain viable.

SERVICE

177. As with sales, Protestant's service opportunities consist of limited numbers of households immediately surrounding Protestant's location. This relationship is clearly shown on the final page of Protestant's Service Smarts Report for June 2011, which breaks down Protestant's active customers by increments of 2 mile distances from Ontario VW. The tremendous increase in customers from the 2 and 4 mile ranges to the 6 and 8 mile ranges is striking.²¹⁹ The establishment of the proposed Montclair point would have a crippling effect on Protestant's service business, because it will result in a reduction of Protestant's service business by more than 20%.²²⁰

178. The RMA and the former Montclair PAI are an important source of service business for Protestant. Ontario Volkswagen services more Volkswagen vehicles with addresses within the former Montclair PAI than any other dealership. In 2012, Ontario Volkswagen serviced 1,165 of the vehicles with addresses in those census tracts. The combined San Bernardino and Victorville PAIs generated slightly more service business for Ontario Volkswagen than the former Montclair PAI, but that will likely change dramatically when the

²¹⁷ Jt. Exh. 44, p. A-51.

²¹⁸ Jt. Exh. 42, Tab. 7, pp. 1-2.

²¹⁹ P. Exh. R 6.

²²⁰ P Exh. R 1, Tab 10.

new San Bernardino dealership opens in November 2013. Once the San Bernardino dealership opens, the Montclair area will be even more critical to Ontario Volkswagen's survival.²²¹

179. Units in operation ("UIOs") refer to the number of Volkswagen vehicles still operating on the road, and UIOs may indicate the potential for service and parts needs. The following chart illustrates the number of Volkswagen vehicle owners who get their vehicles serviced by Volkswagen dealerships and demonstrates the importance of the Montclair PAI on Ontario VW:

Volkswagen Service Vehicles as a Percent of Volkswagen 7-Year UIOs for 2010²²²

Service Vehicles	Montclair PAI	%	Ontario PAI	%
Puente Hills	76	7.4%	18	1.7%
Service Vehicles % 7-Year UIOs	3.3%		0.8%	
Cardinale Way	176	7.7%	92	4.0%
Service Vehicles % 7-Year UIOs	7.7%		4.1%	
Bozzani Motors	500	18.7%	81	3.0%
Service Vehicles % 7-Year UIOs	21.8%		3.6%	
Ontario VW	968	22.5%	1,527	35.4%
Service Vehicles % 7-Year UIOs	42.2%		68.3%	

In 2010, Ontario VW had 968 Volkswagen vehicles coming from the Montclair PAI; this is more vehicles than the rest of the dealers in the market combined.²²³

180. Ontario VW will lose its proximity advantage to between 43.7% to 47.0% of its warranty service, customer pay service, related parts, and its wholesale parts customers if the proposed Montclair point is established.²²⁴

181. In addition, the percentages cited in the previous paragraph do not take into account the fact that the San Bernardino point will be opening in November 2013. At that point in time, the area most proximate to Ontario will have between 25.4% to 38.8% fewer registrations based on drive distance or drive time. This is a similar reduction to that which would come from just the addition of a Montclair point (26.0% to 28.6% reduction) ignoring the reality of the upcoming San Bernardino point. When measured in terms of Volkswagen UIOs,

²²¹ Declaration of Joseph F. Roesner following Remand from the Superior Court, para. 22; Tab 20.

²²² Declaration of Joseph F. Roesner, Remand Report, para. 33; Tab 10, p. 1

²²³ Declaration of Joseph F. Roesner, Remand Report, para. 33; Tab 10, p. 1.

²²⁴ Declaration of Joseph F. Roesner following Remand from the Superior Court, para. 23; Tab 21.

1 the combined reduction in Ontario Volkswagen's area ranges from 63.1% to 67.7%. Because
2 these are the vehicles that generate service and parts sales for the dealership, these two actions
3 together would have a dramatic impact on Ontario Volkswagen.²²⁵

4 182. Evidence submitted after remand from the Sacramento Superior Court
5 demonstrates that VWoA's service sales were down considerably for 2012. During the
6 February 7, 2013, Pacific Area Region ("PAR") conference call, that Mr. Reed attended, VWoA
7 reported that PAR Service Sales were down 3.8% in 2012 compared to 2011, and Parts Sales
8 were down 5.6% compared to 2011. Moreover, it was also reported that Service Absorption
9 dropped from 67.6% in 2011 to 62.01% in 2012.²²⁶

10 183. Mr. Sherman testified at hearing that Ontario VW would lose 20-30% of its
11 service business, and there is not sufficient service business for both Ontario VW and a
12 Montclair dealership.²²⁷ From July 1, 2009 to June 30, 2011, Ontario VW's service market
13 share was 39.3%.²²⁸ However, the establishment of the San Bernardino point in November,
14 2013, is certain to further diminish Volkswagen service business available to Ontario VW.

15 184. Mr. Sherman believes his dealership has the capacity to double its service
16 business, and he attributes the drop off in service business at the time of hearing to the
17 economy.²²⁹

18 185. Ontario VW appreciates the importance of using the internet and mobile
19 technology to reach potential VW customers. It is a fact that many, if not most, consumers
20 today use the internet to shop for services of all kinds. Potential VW customers use the internet
21 to shop and compare when determining where to take their automotive business. Ontario VW
22 makes every effort to maximize these new technological developments to drive customers to its
23 dealership. One example is Protestant's use of its factory approved web site:

24 www.ontariovw.com. The site is maintained by Cobalt, an authorized provider of Volkswagen
25 of America. Protestant consistently strives to get the most from its internet site by utilizing the
26 various tools offered by Cobalt. By making good use of these tools Ontario VW is able to

26 ²²⁵ Declaration of Joseph F. Roesner following Remand from the Superior Court, para. 24; Tab 22.

27 ²²⁶ Declaration of Earl Reed following remand from the Superior Court para. 10.

28 ²²⁷ RT Jan. 10, p. 67; RT Jan. 11, p. 221.

²²⁸ Declaration of Earl Reed [on Remand], para. 6.

²²⁹ RT Jan. 10, p. 102.

1 maximize its internet presence for each of Ontario VW's departments.²³⁰ Protestant also
2 maintains a separate site geared for use on mobile phones and other mobile devices.²³¹

3 186. Exhibit 1 to Earl Reed's Declaration submitted after remand from the Board
4 demonstrates the performance for both Ontario VW's web sites and compares Protestant's
5 performance at the levels of National, Regional, Area 52, DMA, and dealers within 75 miles of
6 Ontario VW. The graph at the bottom of page 1's report shows the performance from May 2010
7 thru June 2011. It is clear that Protestant makes efficient use of the internet to capture available
8 sales and service business.

9 187. Based upon Volkswagen ServiceSmarts Intelligence data, Ontario VW has
10 maintained a Service market share of 39.3% for the time period of July 1, 2009 thru June 30,
11 2011. This level of performance places Ontario VW in the top two of all Area 52 VW dealers.
12 The Area 52 market share for the same time period is 29.4%, Western Region is 36.1%, and the
13 National Service Market share is 38.1%.²³²

14 USED VOLKSWAGENS

15 188. There are two types of used Volkswagen vehicles: (1) Certified Pre-Owned
16 ("CPO"); and (2) other used Volkswagens.

17 189. Ontario VW does a significant amount of used car business in the Montclair
18 PAI, and Protestant contends that establishment of the Montclair dealership will have an impact
19 on those sales.²³³ In 2010, 14.9% of Ontario VW's CPO sales came from the Montclair PAI.
20 With 18 CPO sales into the Montclair PAI, Ontario VW sold 26.9% of all CPO Volkswagen
21 vehicles registered in the Montclair PAI; far more than any other dealer.²³⁴ The following chart
22 illustrates this impact:

23 //

24 //

25 ///

26 ²³⁰ Declaration Earl Reed [on Remand] para. 2.

27 ²³¹ Declaration Earl Reed [on Remand] para. 3.

28 ²³² Declaration Earl Reed [on Remand] para. 6.

²³³ RT Jan. 10, p. 101.

²³⁴ Declaration of Joseph F. Roesner, Remand Report, para. 27; Tab 8 p. 1.

**Certified Pre-Owned Retail Car and Light Truck Buyer Behavior Report for
2010²³⁵**

Certified Pre-Owned Volkswagens	Montclair PAI	%	Ontario PAI	%
Puente Hills % PAI Sum	9 13.4%	9.1%	5 6.6%	5.1%
Cardinale Way % PAI Sum	5 7.5%	3.7%	11 14.5%	8.2%
Bozzani Motors % PAI Sum	11 16.4%	9.7%	8 10.5%	7.1%
Ontario VW % PAI Sum	18 26.9%	14.9%	23 30.3%	19.0%

190. Competition for used Volkswagen vehicles is intense. This is especially true since 2010, when Volkswagen changed its incentive program for CPOs, spurring some dealers to increase participation in the program.²³⁶

191. Volkswagen dealers receive monthly sales objectives for CPOs and for used Volkswagens.²³⁷

192. Competition is active, but there is no shortage of lease returns, which have a 3 year cycle of coming back into the market.²³⁸

193. Increased sales of new Volkswagens to current owners of Volkswagens would add to the Volkswagen used vehicle inventory. Increased sales will depend, in part, on the success of the redesigned Passat, Beetle, and Touareg.

194. From 2009 to March 2011, between 29.8% and 40.5% of Ontario VW's CPO sales were to consumers located in the Montclair RMA. The Montclair area is critical to Ontario VW for used vehicle sales.²³⁹

195. In 2009, Ontario VW sold 156 CPOs: 31 in the Montclair PAI, 45 in the Ontario PAI, and 88 in the Riverside-San Bernardino market, excluding Montclair.²⁴⁰

196. In 2009, Ontario VW sold 41 used vehicles in the Montclair PAI, and non-Volkswagen dealers sold 88 used Volkswagens in the Ontario PAI; 542 used Volkswagens

²³⁵ Declaration of Joseph F. Roesner, Remand Report, para. 27; Tab 8 p. 1.

²³⁶ RT Jan. 10, pp. 80-87; Prot. Exh. 103.

²³⁷ RT Jan. 10, pp. 80-87.

²³⁸ RT Jan. 10, p. 88.

²³⁹ Declaration of Joseph F. Roesner, Remand Report, para. 29, Tab 8, p. 2.

²⁴⁰ Declaration of Sharif Farhat on Remand, para. 16; Exh. Remand - 4.

were sold by non-Volkswagen dealers in the Riverside-San Bernardino market, excluding Montclair.²⁴¹

197. The establishment of the additional dealership in Montclair will likely have a negative impact upon the sale by Ontario VW of used Volkswagens, both CPO units and non-CPO units as the buyers of those vehicles will be more apt to buy from the nearer dealer which will be in Montclair.

WHOLESALE PARTS

198. In addition to parts sold to customers as a component of its service business, Ontario VW has a wholesale parts business. The Montclair PAI is closer to a significant number of Ontario VW's wholesale parts customers.²⁴² The following chart illustrates this:²⁴³

	Air Distance	Drive Time	Drive Distance
Ontario VW's Wholesale Parts Customers Closer to Montclair Add Point than to Ontario VW	372	395	380
Ontario VW's Wholesale Parts Customers	911	911	911
Percent of Ontario VW's Wholesale Parts Customers Closer to Montclair Add Point than to Ontario VW	40.8%	43.4%	41.7%

As can be seen, the chart illustrates that in drive time, 395 of the 911 parts customers (43.4%) are located closer to the Montclair location than to Ontario VW.

199. A Montclair dealership would impact Ontario VW's wholesale parts business. Ontario VW would not lose all business in the Montclair PAI, but it would not maintain all its customers.²⁴⁴

²⁴¹ Declaration of Sharif Farhat on Remand, para. 20.

²⁴² Declaration of Joseph F. Roesner, Remand Report, para. 39, Tab 12.

²⁴³ Declaration of Joseph F. Roesner, Remand Report, Tab 12.

²⁴⁴ Roesner Remand Report, para. 39, Tab 12.

**FINDINGS RELATING TO WHETHER IT IS INJURIOUS TO THE PUBLIC WELFARE FOR AN
ADDITIONAL FRANCHISE TO BE ESTABLISHED [Section 3063(c)]**

200. The Ontario Auto Center is a destination point.²⁴⁵ Ontario is a distinct retail market from Montclair, distinguished by its outlet mall.²⁴⁶

201. A Volkswagen dealership in Montclair would minimize travel time for consumers and increase Volkswagen competition with its primary competitive group brands.

202. The Inland Empire is still in a depressed economic climate but has seen slight recovery.²⁴⁷ A new Volkswagen dealership, anticipated to take two years to get up and running, will provide construction jobs and initially 35 jobs at the dealership, as well as new revenue for the City of Montclair. However, there may be a co-relative loss to the employees at Ontario VW and the City of Ontario.

203. If the Montclair dealership is established, the potential benefit to the public in the RMA will be far outweighed by the likely loss to the public within the RMA, if the establishment negatively impacts the four existing Volkswagen dealers who are already operating in the RMA and dependent upon it for their continued viability.

**FINDINGS RELATING TO WHETHER FRANCHISEES OF THE SAME LINE-MAKE IN
THE RELEVANT MARKET AREA ARE PROVIDING ADEQUATE COMPETITION
AND CONVENIENT CONSUMER CARE FOR VOLKSWAGEN VEHICLES IN
THE MARKET AREA, INCLUDING ADEQUATE SALES AND SERVICE FACILITIES, EQUIPMENT,
SUPPLY OF PARTS, AND QUALIFIED SERVICE PERSONNEL [SECTION 3063(d)]**

204. Ontario VW is a good dealership which is well-managed and does a good job serving its customer base.²⁴⁸ In 2009, Ontario VW increased sales 5% over 2008, when Area 52 was down by 4%.²⁴⁹ However, in 2010, Area 52 increased sales almost 24% over 2009 and Ontario VW was up only 10%.²⁵⁰

205. Mr. Reed, the General Manager of Ontario VW, testified that Volkswagen never counseled the dealership to increase its sales.²⁵¹ Mr. Reed testified that sales into the Montclair

²⁴⁵ RT Jan. 11, p. 43.

²⁴⁶ RT Jan. 19, pp. 175-183.

²⁴⁷ RT Jan. 19, pp. 201-202.

²⁴⁸ RT Jan. 20, pp. 127, 144, 148, 154, 161.

²⁴⁹ RT Jan. 20, pp. 120, 188.

²⁵⁰ RT Jan. 20, pp. 128, 129.

²⁵¹ RT Jan. 10, pp. 68, 71.

1 area are a significant source of business for Ontario VW.²⁵² In 2008, Ontario sold 110 units
2 into the proposed Montclair PAI; in 2009, it sold 116 units.²⁵³

3 206. In support of its contention that it has provided adequate sales and service in the
4 RMA, Ontario VW points to being named as a Generation Best award winner in 2009. The
5 Generation Best award was given to only 23 of Volkswagen's 582 dealers in the United
6 States.²⁵⁴ The process was created, monitored, and administered by a Volkswagen marketing
7 firm.²⁵⁵ Volkswagen representatives conceded that as a Generation Best dealer, Ontario VW
8 was in an elite category.²⁵⁶

9 207. Ontario VW takes pride in winning the Octagon Award in the third quarter of
10 2009 and being tied for top honors in the fourth quarter of 2009.²⁵⁷ This award is competitive
11 within Area 52 and tracks eight standards of performance for Volkswagen dealers.

12 208. Ontario VW has a more than adequate sales facility. A new Market Place
13 facility was constructed with all necessary conveniences for customers. Mr. Reed testified that
14 he did not recall that Volkswagen had ever counseled Ontario VW concerning sales
15 satisfaction.²⁵⁸ In October 2010, Ontario VW ranked at 96% of the sales satisfaction index.²⁵⁹

16 209. Ontario VW has an adequate service facility with 18 service bays.²⁶⁰ Service
17 work was reduced due to the economic downturn, but the dealership has the capacity to
18 perform 50% more service work.

19 210. The dealership has invested in adequate specialized equipment necessary for
20 work on Volkswagen automobiles.

21 211. Currently storage for parts is sufficient but Ontario VW would need a larger
22 inventory of parts with space for storage in the future.²⁶¹

23 ²⁵² RT Jan. 10, p. 74.

24 ²⁵³ P. Exh. 95 at 226, 228.

25 ²⁵⁴ RT Jan. 19, pp. 241, 249.

26 ²⁵⁵ RT Jan. 10, p. 167; RT Jan. 20, p. 123.

27 ²⁵⁶ RT Jan. 19, pp. 241, 249; P. Exh. 53.

28 ²⁵⁷ RT Jan. 10, p. 109; P. Exh. 2.

²⁵⁸ RT Jan. 10, pp. 77 - 78.

²⁵⁹ P. Exh. 25.

²⁶⁰ RT Jan. 10, p. 103.

²⁶¹ RT Jan. 19, pp. 215, 241.

212. There is no shortage of technicians qualified to work on Volkswagen vehicles.²⁶² Volkswagen requires a minimum of 70% of a dealership's technicians, service, and sales staff to be certified as Volkswagen trained.²⁶³ Volkswagen offers web-based training as well as training at Volkswagen learning centers.²⁶⁴

213. Universal Technical Institute conducted a program for training Volkswagen technicians, but this program ended in 2010.²⁶⁵ A new "fast track" training program was scheduled to begin in 2011.²⁶⁶

214. Due to the decline in service business, Ontario VW had lost technicians, but there is no evidence that Ontario VW does not have sufficient trained technicians.²⁶⁷

215. Although the burden of proof is upon the Protestant, there was no claim by VWoA that the Protestant or that any of the other franchisees in the RMA are lacking or deficient with regards to sales and service facilities, equipment, supply of parts and qualified service personnel. Therefore, the Board must presume that the existing dealers are providing adequate consumer care in the RMA.

**FINDINGS RELATING TO WHETHER THE ESTABLISHMENT OF AN
ADDITIONAL FRANCHISE WOULD INCREASE COMPETITION AND
THEREFORE BE IN THE PUBLIC INTEREST [SECTION 3063(e)]**

216. Ontario VW must show that any negative impact upon it, caused by the proposed establishment of a Montclair dealership, outweighs the benefits to the consuming public from the increased competition a new dealership would bring. A concern here may be that the "over-dealering" of an area will increase competition beyond the point where it is in the public's best interest. This negative effect could occur if the increased competition causes a dealership to close because there is simply not enough business to allow all dealers in the RMA

²⁶² RT Jan. 19, pp. 205, 233. Mr. Sherman expressed concern that a new Montclair dealership would hire quality technicians away from Ontario VW, thus leaving the dealership with insufficient trained technicians. Mr. John Hawkins explained that his preference is to staff a new dealership with employees from his organization and train them to Volkswagen standards. RT Jan. 20, pp. 20-21.

²⁶³ RT Jan. 19, p. 223.

²⁶⁴ RT Jan. 19, pp. 210, 212.

²⁶⁵ RT Jan. 10, p. 107; RT Jan. 19, p. 205.

²⁶⁶ RT Jan. 19, p. 208.

²⁶⁷ RT Jan. 10, p. 62.

1 to be profitable. Given the difficult economic times that exist now, another recessionary dip
2 could cause any number of dealerships to cease operations. It is a time when it may be better to
3 err towards maintaining the status quo as to the number of dealers so that an existing dealership
4 has a better opportunity to survive, preserve its investment, and continue to contribute to the
5 public welfare than to lean towards allowing a franchisor to establish another franchisee. There
6 is no doubt that the existing franchisee has greater risk of its capital, and investment than does
7 the franchisor who will more than likely be looking to the prospective new franchisee for all or
8 almost all of the capital necessary to open the new dealership. A franchisor bears the expense
9 of designing and manufacturing products. This cost is generally in the hundreds of millions of
10 dollar range. It is also true that these expenses can be recovered from the entire dealer body,
11 whereas any one existing franchisee has only that one location from which to protect its
12 investment.

13 217. VWoA underperforms compared to other competitive line-makes in the
14 Montclair RMA. While the Board believes that establishing a Volkswagen dealership in
15 Montclair would benefit VWoA in the short term, such an event would harm Ontario VW and
16 the public in the long run. The brand would be visible on the high-traffic I-10 Freeway at a
17 location where two members of VWoA's primary competitive group, Nissan and Honda, are
18 also located.²⁶⁸ This would probably generate interest in the Volkswagen brand and promote
19 some sales. However, VWoA's interests must be balanced against Ontario VW's interests in
20 maintaining a viable business, as well as public interest in adequate competition and convenient
21 service.

22 218. Projected sales for the Montclair Open Point were set at 571 for 2011, 764 for
23 2012 and 1,057 for 2013.²⁶⁹ The Board believes that placing a dealer in an auto mall or on the
24 freeway would increase sales but this would occur to the detriment of Ontario VW.²⁷⁰

25 //

26 //

27 ²⁶⁸ RT Jan. 13, p. 107.

28 ²⁶⁹ Jt. Exh. 24.

²⁷⁰ RT Jan 10, p. 210-211; RT Jan 11, pp. 27, 120-121, 146- 147.

CONCLUSIONS

PERMANENCY OF THE INVESTMENT [VEHICLE CODE SECTION 3063(a)]

219. Protestant Ontario VW has established permanency of its investment because it is a dealer with longevity, has constructed a market place facility in 2003 at substantial cost, and has expended the financial outlays required over the years to modernize and maintain the dealership's building and equipment. Protestant has established that it has a significant and permanent investment.

EFFECT ON THE RETAIL MOTOR VEHICLE BUSINESS AND THE CONSUMING PUBLIC IN THE RELEVANT MARKET AREA [VEHICLE CODE SECTION 3063(b)]

220. Protestant has established that there will be a significant adverse effect upon the retail motor vehicle business in the RMA if the additional dealership is established and that there would be no benefit to the public that would out-weigh this negative effect.

WHETHER IT IS INJURIOUS TO THE PUBLIC WELFARE FOR AN ADDITIONAL FRANCHISE TO BE ESTABLISHED [VEHICLE CODE SECTION 3063(c)]

221. Protestant has established that it and the other dealers presently providing sales and services to the public in the RMA would more likely than not suffer a loss of business if the additional dealership were to be established. The impact upon them would cause more loss to them and indirectly to the public than would there be benefit gained by the public if an additional Volkswagen dealership were to be established at the proposed location under the current economic conditions.

WHETHER THE VOLKSWAGEN FRANCHISEES ARE PROVIDING ADEQUATE COMPETITION AND CONVENIENT CONSUMER CARE FOR VOLKSWAGEN VEHICLES IN THE RELEVANT MARKET AREA, WHICH SHALL INCLUDE THE ADEQUACY OF MOTOR VEHICLE SALES AND SERVICE FACILITIES, EQUIPMENT, SUPPLY OF VEHICLE PARTS, AND QUALIFIED SERVICE PERSONNEL [VEHICLE CODE SECTION 3063(d)]

222. Ontario VW's sales and service facilities were built in 2003, and they are more than adequate to provide adequate consumer care. Ontario VW has invested in the specialized equipment necessary to servicing Volkswagens. The dealership's supply of vehicle parts and storage is currently adequate. Ontario VW has sufficient qualified service technicians. There

1 was no claim that there was a significant deficiency as to these factors as they pertain to
2 Ontario VW or the other Volkswagen franchisees who are responsible for serving the owners of
3 Volkswagen vehicles in the RMA.

4
5 **WHETHER THE ESTABLISHMENT OF AN ADDITIONAL DEALERSHIP WOULD INCREASE**
6 **COMPETITION AND THEREFORE BE IN THE PUBLIC INTEREST**
7 **[VEHICLE CODE SECTION 3063(e)]**

8 223. The Board believes that there may likely be a spike in Volkswagen sales in the
9 RMA. However, this increase would likely come from the sales opportunities available to
10 Ontario VW and the other three Volkswagen franchisees whose PAIs comprise a part of the
11 RMA. Although there may be an increase in competition in the RMA, it is unlikely that the
12 increase will be of benefit to the public.

13 224. Ontario VW is profitable and considered to have good management. Although
14 Mr. Roesner's dramatic numbers of "loss" are not absolute proof of lost sales or income, the
15 Riverside-San Bernardino market (including the RMA) is still "at risk" economically and
16 demographically, and the Board believes that the survivability of Ontario VW is tenuous under
17 the current economic conditions. Any additional negative factors could cause havoc to the
18 existing Volkswagen dealerships if an additional dealership were established. The
19 establishment of an additional dealership at the location proposed, which is in the heart of the
20 better market when comparing the Montclair PAI to the Ontario PAI, would exacerbate the
21 effect upon Ontario VW if such a negative event or economic downturn occurs. The "risk-
22 benefit" analysis which must be made under these circumstances leads to the conclusion that
23 Ontario VW has established that the adverse risk to the public is greater than the benefit that
24 would flow from the proposed establishment.

25 **DETERMINATION OF ISSUES**

26 225. Protestant has sustained its burden of proof of establishing the permanency of its
27 investment. [Section 3063(a)]
28

1 226. Protestant has sustained its burden of proof of showing there would be an
2 adverse effect on the retail motor vehicle business and the consuming public in the relevant
3 market area if the Montclair dealership is established. [Section 3063(b)]

4 227. Protestant has proved that it would be injurious to the public welfare for the
5 Montclair dealership to be established. [Section 3063(c)]

6 228. Protestant has sustained its burden of proof of establishing that there is adequate
7 competition and convenient consumer care in terms of sales and distance. Protestant has
8 sustained its burden of proof of showing the adequacy of sales and service facilities, equipment,
9 supply of vehicle parts, and qualified service personnel. [Section 3063(d)]

10 229. Protestant has sustained its burden of proof of proving that competition,
11 although it would likely increase if the establishment is allowed, would not be in the public
12 interest. [Section 3063(e)]

13
14 Protestant offers the preceding proposed findings for acceptance by the Board in support
15 of its Decision to sustain the Protest.

16
17
18 Dated: June 17, 2013

LAW OFFICES OF
MICHAEL J. FLANAGAN

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20
21 By: _____
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